

*Manitoba
Farmers and
the LAW*

MANIT^{BA}
AGRICULTURE

MANITOBA FARMERS
AND THE LAW

by
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- NOTE -

These materials have been prepared to give a general view of the subject and to promote thought and discussion. They are not designed to present a complete and precise statement of the law, and the law as presented may be changed in some particulars by subsequent decisions or enactments. The materials should therefore not be used by readers as a basis for resolving their specific legal problems, which may have special facts giving rise to particular legal implications and considerations.

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Introduction

1

Contract Law

- WHAT EXACTLY IS A CONTRACT? 3
- HOW DOES ONE MAKE A CONTRACT? 3
- IS EVERY SUGGESTION THAT I MIGHT BE WILLING TO SELL OR TO DO SOMETHING AN OFFER WHICH CAN BE ACCEPTED? 4
- WHAT HAPPENS IF I AM NOT SATISFIED WITH ALL THE TERMS OF THE OFFER MADE TO ME, AND THEREFORE MY ACCEPTANCE DIFFERS FROM THE OFFER? 4
- WHAT HAPPENS IF I HAVE MADE AN OFFER TO SELL OR BUY SOMETHING, BUT LATER CHANGE MY MIND? CAN I WITHDRAW THIS OFFER? 5
- CAN ANYBODY MAKE A BINDING CONTRACT? 5
- WHAT TYPES OF CONTRACTS MUST BE IN WRITING? 5
- CAN I GET OUT OF A CONTRACT ONCE IT HAS BEEN MADE? 6
- WHAT CAN I DO IF THE OTHER PARTY BREACHES A TERM OF THE CONTRACT? 9

Insurance

- WHAT EXACTLY IS A CONTRACT OF INSURANCE? 12

- IF I BUY SOMETHING THAT HAS BEEN INSURED BY THE SELLER, AM I COVERED? 12
- WHAT CAN I INSURE? 13
- WHEN MUST THE INSURABLE INTEREST EXIST? 14
- HOW MUCH CAN I RECOVER? 14
- DOES AN AMOUNT OF MONEY RECEIVED BY WAY OF A GIFT HAVE TO BE TAKEN INTO ACCOUNT? 15
- IF MY PROPERTY IS COVERED BY, SAY, FIRE INSURANCE, AND IT IS DESTROYED DUE TO THE NEGLIGENCE OF A NEIGHBOUR, CAN THE INSURANCE COMPANY SUE THIS NEIGHBOUR? WHAT IF I NEGLIGENTLY CAUSE THE LOSS TO MY OWN PROPERTY? 15
- CAN I SETTLE WITH THE PERSON WHO CAUSED THE DAMAGE TO MY PROPERTY, SO THAT THE INSURANCE COMPANY IS DENIED ITS RIGHT TO SUBROGATION? 15
- WHEN APPLYING FOR INSURANCE, MUST I TELL THE INSURANCE COMPANY EVERYTHING? 16

Some important areas where care is required

Fire Insurance

- WHAT HAPPENS IF I DON'T TELL THE EXACT TRUTH ABOUT THE PROPERTY TO BE INSURED? 16
- WHAT HAPPENS IF I INSURE PROPERTY OWNED BY SOMEONE ELSE? 17
- WHAT HAPPENS IF I MAKE ALTERATIONS TO MY PROPERTY AFTER I HAVE INSURED IT? 17

Automobile Insurance

- WHAT HAPPENS IF I DON'T TELL THE EXACT TRUTH TO THE AUTOMOBILE INSURANCE COMPANY? 18

Life Insurance

- WHEN I APPLY FOR LIFE INSURANCE, MUST I DISCLOSE EVERYTHING ABOUT MY HEALTH TO THE INSURANCE COMPANY? 18

Crop Insurance

- IS IT POSSIBLE TO LOSE MY COVERAGE? 19

General

- WHAT HAPPENS IF THE INSURANCE AGENT WHO FILLS IN MY APPLICATION MAKES A MISTAKE, AND I SIGN IT WITHOUT NOTICING? 19
- WHAT HAPPENS IF I PURCHASE AN INSURANCE POLICY WHICH IS FOR LESS THAN THE ACTUAL VALUE OF MY PROPERTY? 19

Business Organizations

TYPES OF BUSINESS ORGANIZATIONS

Sole Proprietorship

- WHAT ARE THE ADVANTAGES OF A SOLE PROPRIETORSHIP? 21
- WHAT ARE THE DISADVANTAGES OF A SOLE PROPRIETORSHIP? 21

Partnership

- IS A PARTNERSHIP CREATED WHENEVER PEOPLE WORK TOGETHER? 22
- HOW DOES ONE CREATE A PARTNERSHIP? 22
- WHAT ARE THE RIGHTS AND OBLIGATIONS OF THE PARTNERS? 23
- HOW CAN A PARTNERSHIP BE DISOLVED? 25
- WHAT ARE THE ADVANTAGES OF A PARTNERSHIP? 25
- WHAT ARE THE DISADVANTAGES OF A PARTNERSHIP? 26
- IS THERE ANY WAY WHICH A PARTNER MAY LIMIT HIS OR HER LIABILITY? 26

<u>Corporation</u>	27
- HOW DOES ONE CREATE A CORPORATION?	28
- CAN A CORPORATION ISSUE DIFFERENT TYPES OF SHARES?	31
- WHO IS LIABLE FOR CONTRACTS ENTERED INTO ON BEHALF OF A CORPORATION BEFOR IT COMES INTO EXISTENCE?	32
- WHAT ARE THE ADVANTAGES OF INCORPORATION?	32
- WHAT ARE THE DISADVANTAGES OF INCORPORATION?	33

<u>Cooperatives</u>	
- HOW DOES ONE FORM A COOPERATIVE?	33
- WHAT ARE THE ADVANTAGES OF A COOPERATIVE?	34
- WHAT ARE THE DISADVANTAGES OF A COOPERATIVE?	34

Land Law

- WHAT IS INCLUDED IN THE DEFINITION OF LAND?	37
- WHAT ARE THE FORMS OF OWNERSHIP OF LAND?	38
- WHAT IS DOWER?	39
- WHAT RIGHTS DOES <u>THE DOWER ACT</u> GIVE TO A SPOUSE?	39

<u>Co-ownership</u>	
- HOW IS CO-OWNERSHIP DEALT WITH IN OUR SYSTEM?	40

<u>Joint Tenants</u>	40
----------------------	----

<u>Tenants in Common</u>	41
--------------------------	----

<u>Partition</u>	
- WHAT CAN BE DONE IF CO-OWNERS DECIDE THAT THEY DO NOT WANT TO BE CO-OWNERS, BUT THEY CAN'T AGREE ON HOW TO DIVIDE THE PROPERTY?	41

LAND TITLES

The Old System 42

The Torrens System 42

BUYING AND SELLING LAND

- WHAT ARE THE PRELIMINARY PROCEDURES INVOLVED IN THE BUYING AND SELLING OF LAND? 43
- WHAT HAPPENS IF AFTER THE OFFER TO PURCHASE HAS BEEN ACCEPTED ONE OF THE PARTIES ATTEMPTS TO GET OUT OF THE AGREEMENT? 45
- WHAT ARE SOME OF THE POSSIBLE METHODS OF FINANCING THE PURCHASE OF LAND? 45

THE LAND CONVEYANCING PROCESS

- HOW IS LAND OWNERSHIP TRANSFERRED FROM THE SELLER TO THE BUYER? 46
- WHAT ARE EASEMENTS? 47

Restriction on Foreign Ownership 48

Land Expropriation and Compensation

- WHAT IS EXPROPRIATION AND WHO MAY DO IT? 48
- WHAT PROCEDURE IS REQUIRED FOR THE EXPROPRIATION OF LAND? 48

The Leasing of Land

- WHAT ARE THE REQUIREMENTS OF A LEASE? 50
- WHAT ARE THE BASIC TERMS THAT SHOULD BE INCLUDED IN A LEASE? 52
- WHAT ARE THE DIFFERENT KINDS OF LEASING ARRANGEMENTS FOR FARM PROPERTY? 52

Farm Machinery & Equipment & Personal Property Law

THE FARM MACHINERY AND EQUIPMENT ACT

- TO WHAT TYPES OF TRANSACTIONS DOES THE ACT APPLY? 56

- WHAT DOES THE ACT PROVIDE IN REGARD TO REPAIR PARTS AND EMERGENCY SERVICE?	57
- WHAT CAN I DO IF THE DEALER FROM WHOM I HAVE PURCHASED MY EQUIPMENT FAILS TO DELIVER IT ON THE DATE SPECIFIED?	58
- DOES THE PURCHASER OF NEW FARM MACHINERY HAVE A TRIAL PERIOD?	59
- DOES THE ACT PROVIDE FOR A WARRANTY ON NEW FARM MACHINERY, AND, IF SO, FOR HOW LONG?	59
- WHAT IF THE PURCHASER IS UNABLE TO READ THE LANGUAGE IN WHICH THE CONTRACT IS WRITTEN?	61
- WHEN DOES THE CONTRACT BECOME BINDING ON THE PURCHASER?	61
- HOW DOES THE DEALER, BANK, FINANCE COMPANY, OR OTHER PERSON FINANCING THE PURCHASE OF FARM EQUIPMENT INSURE THAT THE UNPAID BALANCE OF THE PURCHASE OF THE PURCHASE MONEY WILL BE PAID?	61
- WHAT CAN THE LIENHOLDER DO IF THE PURCHASER DEFAULTS IN HIS OR HER PAYMENTS?	62
- THE ACT GIVES THE PURCHASER OF FARM EQUIPMENT A LARGE NUMBER OF RIGHTS. IS THERE ANY REQUIREMENT THAT THE PURCHASER BE INFORMED OF THESE RIGHTS?	62

PERSONAL PROPERTY LAW

- WHAT IS THE DIFFERENCE BETWEEN OWNERSHIP AND POSSESSION OF PROPERTY?	64
- WHAT CAN BE DONE WHEN SOMEONE WRONGFULLY INTERFERES WITH ANOTHER'S PROPERTY?	65
- WHAT ARE THE METHODS OF ACQUIRING TITLE TO PERSONAL PROPERTY?	66

Exceptions to the Rules of Acquiring Title 67

- WHAT IF I FIND SOMEONE ELSE'S LOST PROPERTY?	68
- WHAT ABOUT GIVING SOMEONE A GIFT?	68
- WHAT IS BAILMENT?	70
- IS THERE A WAY IN WHICH BAILEES CAN LIMIT LIABILITY IF THEY LOSE OR DAMAGE THE BAILOR'S PROPERTY?	70

- WHAT IS INVOLUNTARY BAILMENT?	72
- WHAT IS A PLEDGE?	72
- WHAT IS A LIEN?	72

The Personal Property Security Act

- WHAT ARE THE BASICS OF THE REGISTRY SYSTEM?	74
- HOW DO YOU SEARCH THE PERSONAL PROPERTY REGISTRY TO INSURE THAT THE APPARENT OWNER OF THE ITEM IS IN FACT THE REAL OWNER, AND HAS THE RIGHT TO SELL THE ITEM OR PLEDGE IT AS COLLATERAL?	74
- WHEN SHOULD A SEARCH OF THE PERSONAL PROPERTY REGISTRY BE MADE?	75
- HOW DOES ONE REGISTER A SECURITY INTEREST?	75

THE SALE OF GOODS ACT

- TO WHAT TYPES OF CONTRACTS DOES THE ACT APPLY?	76
- WHAT ARE THE MORE IMPORTANT TERMS OF A CONTRACT OF SALE IMPLIED BY THE ACT?	76
- WHAT DOES THE ACT PROVIDE IN REGARD TO PAYMENT?	78
- WHAT DOES THE ACT PROVIDE IN REGARD TO DELIVERY?	78
- WHEN DOES THE RISK FOR LOSS CAUSED BY DAMAGE TO OR DESTRUCTION OF THE GOODS PASS FROM THE SELLER TO THE BUYER?	79

THE CONSUMER PROTECTION ACT

- DOES THE ACT APPLY TO THE SALE OF ALL GOODS AND SERVICES?	81
- WHAT ARE SOME OF THE MAJOR PROVISIONS OF THE ACT?	81
- WHAT DOES THE MANITOBA CONSUMER'S BUREAU DO?	83

Income Tax

Record Keeping

- WHAT KIND OF RECORDS MUST I KEEP? 86

Income

- HOW DOES ONE DETERMINE FARM INCOME? 87
- WHAT TRANSACTIONS MUST I INCLUDE IN MY INCOME? 87
- IF I RECEIVE A CHEQUE AT THE END OF A YEAR BUT DON'T CASH IT UNTIL THE FOLLOWING YEAR, IN WHICH YEAR DO I RECORD IT AS INCOME? 88
- WHAT TRANSACTIONS CAN I DEDUCT FROM MY INCOME AS EXPENSES? 89

Types of Farmers

- WHAT ACTIVITIES CAN BE CLASSIFIED AS FARMING? 90

The Tax Year 91

Deemed Dispositions

- WHAT IS A DEEMED DISPOSITION? 91

Basic Herds 92

Capital Cost Allowance 93

Eligible Capital Expenditures 97

Capital Gains 98

- WHAT IS VALUATION DAY? 99

Involuntary Dispositions

- DO I HAVE TO PAY CAPITAL GAINS TAXES IF SOME OF MY PROPERTY IS STOLEN, DESTROYED, OR EXPROPRIATED, AND I AM COMPENSATED FOR THE LOSS? 99
- DOES A FARMER HAVE TO PAY CAPITAL GAINS TAX IF HE TRANSFERS HIS FARM TO HIS SPOUSE OR CHILD? 100

Principal Residence

- IS THE SALE OF MY PRINCIPAL RESIDENCE
SUBJECT TO CAPITAL GAINS TAX? 103
- HOW DOES ONE CALCULATE THE PRINCIPAL
RESIDENCE EXEMPTION IF A FARMER DISPOSES
OF ALL OF HIS FARM PROPERTY IN ONE
TRANSACTION, INCLUDING THE FARM HOUSE? 104

Losses

- CAN THE LOSSES OF ONE YEAR BE USED TO
OFFSET THE INCOME OF OTHER YEARS? 105

Small Business Deduction 106

Averaging 107

The Powers Of Revenue Canada and the Rights of the Taxpayer

- WHAT CAN HAPPEN IF I DON'T PAY MY INCOME
TAXES AND I AM CAUGHT? 110
- WHAT CAN I DO IF I CALCULATE MY TAX PAYABLE,
PAY THIS AMOUNT, BUT REVENUE CANADA
REASSESSES ME FOR A DIFFERENT AMOUNT? 110
- IS THERE A METHOD BY WHICH I CAN GET A
STATEMENT FROM REVENUE CANADA INFORMING
ME AS TO HOW THEY WILL INTERPRET THE INCOME
TAX ACT IN RESPECT OF A PARTICULAR
TRANSACTION? 111
- WHAT POWERS DOES REVENUE CANADA TO INVES-
TIGATE TAX AVOIDANCE AND NON-COMPLIANCE
WITH THE INCOME TAX ACT? 112
- WHAT IS A TAX AUDIT? 113
- IF I HAVE FAILED TO FILE A TAX RETURN AS
REQUIRED, OR IF I HAVE FILED A FALSE RETURN,
IS THERE ANY WAY IN WHICH I CAN AVOID
PROSECUTION? 114

Estate Planning

- WHAT EXACTLY IS ESTATE PLANNING? 116
- HOW DOES ONE CREATE A TAX PLAN? 116
- DOES ESTATE PLANNING INVOLVE THE TAKING
ADVANTAGE OF "LOOP HOLES" IN THE TAX
LAWS? 117

Responsibility to others

NEGLIGENCE

- AM I RESPONSIBLE FOR MY CARELESS ACTS? 120

NUISANCE

- WHAT KIND OF ACTIVITY CONSITUTES A NUISANCE
IN LAW? 123

RESPONSIBILITY

- IS AN EMPLOYER RESPONSIBLE FOR THE WRONG-
FUL ACTIONS OF AN EMPLOYEE? 123
- IS AN OWNER RESPONSIBLE FOR THE ACTIONS OF
HIS OR HER ANIMALS? 124
- WHAT IS THE LAW IN REGARD TO LIABILITY
FOR FIRES? 124

OCCUPIER'S LIABILITY

- AM I RESPONSIBLE FOR INJURIES SUFFERED BY
PEOPLE WHO ARE ON MY PROPERTY? 125
- IF A VISITOR IS INJURED WHILE ON MY PROPERTY,
ARE THERE ANY DEFENCES I CAN RAISE TO ESCAPE
LIABILITY? 127

Family Law

- WHAT LEGAL REQUIREMENTS MUST BE MET BEFORE A PERSON CAN GET LEGALLY MARRIED? 130
- WHAT RIGHTS AND OBLIGATIONS DO THE SPOUSES HAVE DURING MARRIAGE? 130
- WHAT IS THE PURPOSE OF A FORMAL, WRITTEN, MARRIAGE CONTRACT? 132
- WHAT OPTIONS ARE AVAILABLE ON THE BREAKDOWN OF A MARRIAGE? 132
- WHAT IS A SEPARATION AGREEMENT? 133
- WHAT IS A COURT ORDER OF SEPARATION? 133

Divorce

- WHAT ARE THE GROUNDS FOR OBTAINING A DIVORCE? 134
- ARE THERE ANY SITUATIONS OR CIRCUMSTANCES WHERE THE COURT WILL NOT GRANT A DIVORCE? 135
- WILL A DIVORCE COURT DEAL WITH CUSTODY AND MAINTENANCE? 136
- WHAT HAPPENS AFTER A DECREE OF DIVORCE HAS BEEN GRANTED BY THE COURT? 137
- HOW SOON AFTER THE DIVORCE MAY THE PARTIES REMARRY? 137
- CAN A DIVORCE ORDER BE VARIED? 137

THE MARITAL PROPERTY ACT

- WHO DOES MARITAL PROPERTY BELONG TO? 137
- TO WHOM AND TO WHAT ASSETS DOES THE ACT APPLY? 137
- WHAT CATEGORIES OF ASSETS ARE THERE UNDER THE ACT? 138
- WHAT TYPE OF ASSET IS A FARM? 139
- WHEN DOES THE RIGHT TO APPLY FOR AN EQUAL DIVISION OF ASSETS ARISE? 139

THE FAMILY MAINTENANCE ACT

- WHAT DOES THIS ACT SAY ABOUT MAINTENANCE OF THE CHILDREN OF THE MARRIAGE? 139
- CAN I STAY IN OUR HOUSE ALONE EVEN IF THE HOUSE IS NOT IN MY NAME? 140

Commonlaw Relationships

- WHAT RIGHTS AND OBLIGATIONS ARE THERE IN UNMARRIED RELATIONSHIPS? 140

General

- WHAT IS THE LAW IN REGARD TO CHILD NEGLECT OR ABUSE? 142
- ARE CANADA PENSION PLAN BENEFITS SHARED IN ANY WAY AT THE END OF A MARRIAGE? 142
- ASSUMING THAT A MAINTENANCE ORDER HAS BEEN MADE, HOW CAN THE RECIPIENT SPOUSE INSURE THAT HE OR SHE WILL RECEIVE THE MONEY? 142
- IF A CUSTODY ORDER HAS BEEN GRANTED, WHAT IS THERE TO PREVENT THE CHILD FROM BEING TAKEN TO ANOTHER PROVINCE OR JURISDICTION? 143

Bankruptcy

- WHAT CAN BE DONE TO AVOID THE NECESSITY OF DECLARING BANKRUPTCY? 145
- WHAT IS THE DIFFERENCE BETWEEN INSOLVENCY AND BANKRUPTCY? 146
- HOW IS BANKRUPTCY GOVERNED AND WHAT IS ITS PURPOSE? 147
- TO WHOM DOES THE BANKRUPTCY ACT APPLY? 147
- WHAT ARE THE METHODS OF PROCEDURE IN BANKRUPTCY? 147
- WHAT ARE "ACTS OF BANKRUPTCY"? 148
- WHAT HAPPENS AFTER THE DEBTOR'S ASSETS HAVE BEEN TRANSFERED TO THE TRUSTEE IN BANKRUPTCY? 149

- WHAT ARE THE DUTIES OF A BANKRUPT DEBTOR?	150
- HOW IS A BANKRUPT DEBTOR DISCHARGED?	151
- WHAT ARE THE ORDERLY PAYMENT OF DEBT PROVISIONS IN THE ACT?	151
- CAN A CREDITOR HIRE A COLLECTION AGENCY TO COLLECT ITS DEBTS?	152

Wills

- WHY SHOULD I BOTHER TO MAKE A WILL?	155
- DOES <u>THE DOWER ACT</u> ALWAYS APPLY?	156
- WHAT IF A WILL DOES NOT ADEQUATELY PROVIDE FOR A FAMILY MEMBER?	156
- WHAT HAPPENS IF BOTH SPOUSES SHOULD DIE AT THE SAME TIME?	157
- WHAT IF THE DECEASED IS SINGLE?	158
- WHAT ARE THE REQUIREMENTS OF MAKING A WILL?	158
- WHAT SHOULD BE INCLUDED IN MY WILL?	159
- WHAT INFORMATION DO LAWYERS REQUIRE BEFORE THEY CAN MAKE A WILL?	160
- IS THERE A WAY IN WHICH THE RESULTS OF THE SIMULTANEOUS DEATH OF BOTH SPOUSES CAN BE OVERCOME?	161
- HOW CAN I REVOKE OR ALTER MY WILL?	161
- IS IT POSSIBLE TO HAVE A CONDITIONAL WILL?	162
- WHAT ARE MUTUAL AND JOINT WILLS?	162
- WHAT IS PROBATE AND ADMINISTRATION, AND HOW IS IT DONE?	162

- WHAT SHOULD I CONSIDER IN CHOOSING AN EXECUTOR?	165
- DOES ESTATE PLANNING HAVE A ROLE TO PLAY IN THIS AREA OF THE LAW?	165
- WHAT CAN'T A WILL DO?	165

Glossary

168

INTRODUCTION

This book is written in the hope that Manitoba farmers will become more acquainted with the basic legal principles that govern their everyday lives. It is not intended to turn you all into legal scholars, but to give you a basic understanding of the law, which should alert you to possible legal problems. This understanding can help you to avoid many common legal pitfalls, as well as make you aware of many of the rights you have under the law of this province and this country.

It would be a mistake to use this book to resolve your specific legal problems. But, by reading and understanding it, you will have a better understanding of when, and in which areas of the law you should seek advice from those qualified to give it.

In writing a book of this nature compromises must be made. The explanation of the law must be simplified by removing much of the legal terminology, as "legalese" often sounds like a foreign language. On the other hand, the law could be oversimplified to such an extent that by removing the legal terminology, the explanation could become misleading or unclear. What follows is therefore a compromise. Some of the "legalese" remains, but enough has been taken out to make the law comprehensible.

This book can be read from cover to cover, but if your time is at a premium, you could just read the chapters that are of interest to you. Keep in mind however, that some of the chapters refer to material in other chapters.

Each chapter attempts to outline the law in one particular area. This is done by briefly explaining the law in that area, and by answering specific questions which we felt would be of particular interest to you. The answers to any particular question go beyond the specific question, and often cover related areas. So, the questions allow you to zero in on one specific problem in a given chapter.

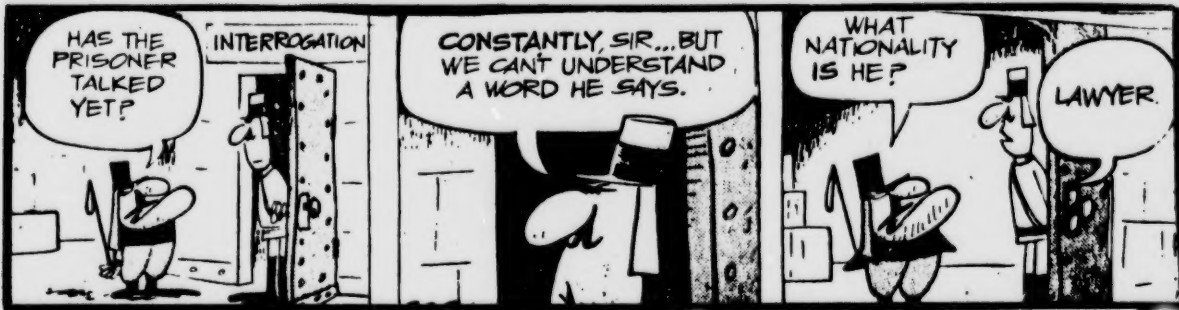
A small glossary is also provided at the end of the book. This should help to explain any of the legal terminology used, but it should be noted that most new words are defined at the time they are used. If you have any problem in understanding a particular area, we suggest that you continue to read on to the end of the chapter. If you then re-read the difficult material, it should become more clear.

And finally, this book does not cover all of the areas of the law that will be of concern to you. Therefore,

your suggestions and comments are welcome for future revisions of this book. In order that we can cover the areas of interest to you in the future, or if you have any comments to make about this version, you can write to:

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We look forward to hearing from you.



CONTRACT LAW

Q. WHAT EXACTLY IS A CONTRACT?

A contract is simply an agreement between two or more persons, or a promise or set of promises, which the law will enforce.

Q. HOW DOES ONE MAKE A CONTRACT?

To answer this question we must introduce some simple legal terms. The "offeror" in contract law is the person who makes the offer and looks for acceptance from the offeree. The "offeree" in contract law is the person to whom an offer is made. The "offer" is a definite statement that the person making it is willing to be bound on the terms stated. The "acceptance" comes from the offeree. The acceptance means that the offeree agrees to the terms of the offer made by the offeror. This can be understood by looking at the following example.

Say you have a plow that you want to sell for \$1,000. You think that your neighbour John Jones might want to buy it. So you phone John and say, "I will sell you my plow for \$1,000." You are the offeror and the words "I will sell you my plow for \$1,000" is an offer. If John says "Yes, I will buy your plow for \$1,000" there is an acceptance. John is the offeree and the words "Yes, I will buy your plow for \$1,000" are the acceptance of your offer. When the acceptance has been made we have a binding contract. It must be noted that the acceptance must be communicated by the offeree to the offeror.

We must now add one more essential requirement in the formation of a contract - consideration. At the root of contract law is the concept of a bargain. That is, one party must pay a price, for the promise he obtains from the other party. "Consideration" is the price for which the promise or the act of the other is bought. This can be understood by looking at the following examples.

John Jones offers to sell you his truck for \$5,000. You accept this offer and give John \$5,000. The \$5,000 that you have given John is the consideration. But the consideration need not be money. John Jones offers to sell you his truck in return for your working for him during the month of June and July. Your two months service in this case would be the consideration.

Consideration is essential to make a contract binding in law. A promise made without consideration is called a "gratuitous promise" and, although accepted by the person to whom it is made, does not make a contract, and is not enforceable in law. For example, if John Jones promises to give you 1,000 bales of hay but doesn't, you can't force him to give you this hay because you have given no consideration for this promise.

Q. IS EVERY SUGGESTION THAT I MIGHT BE WILLING TO SELL OR DO SOMETHING AN OFFER WHICH CAN BE ACCEPTED?

No, not everything which at first might appear to be an offer, is an offer which is capable of being accepted. The statement in question could be what is called an "invitation to treat". An invitation to treat refers to the preliminary statements or negotiations that take place before an offer is made. In contrast, an offer is a definite statement that the person making it is willing to be bound on the terms stated.

It has been held that advertisements and circulars are generally invitations to treat, and not offers. The displaying of goods in a store is also considered to be an invitation to treat. So let us analyse the following fact situation. You hear an advertisement on T.V. which informs you that a local store is having a sale on tires. You go to this store and select two tires from a rack, and then go to the check-out counter to pay for them. The T.V. advertisement and the displaying of the tires in the store are considered to be invitations to treat. When you have selected the tires that you want and taken them to the check-out counter you are making an offer to purchase them. When the cashier takes your money or your promise to pay for them at a later date, there is an acceptance of your offer. The money that you used to pay for the tires, or the promise that you will pay for them in the future, is your consideration for the bargain.

Q. WHAT HAPPENS IF I AM NOT SATISFIED WITH ALL OF THE TERMS OF THE OFFER MADE TO ME, AND THEREFORE MY ACCEPTANCE DIFFERS FROM THE OFFER?

It is a basic rule of contract law that the acceptance must be identical to the offer. Therefore the offeree can't accept part of the offer, or add new terms. Silence can't be taken as an acceptance of the offer. If the offeror has specified that the acceptance must be communicated to him in some special manner, then the offeree must comply with these instructions before there can be a valid acceptance.

If an offer has been made to you, but you are not satisfied with the terms of this offer and therefore make a change, we have what is called a "counter-offer". This is in effect a new offer made by yourself. The counter-offer destroys the original offer, so that the original offer can't be accepted at a later time if you later decide that it was reasonable. This can be clarified by the following example.

John Jones offers to sell you his tractor for \$10,000. You feel that he is asking too much, so you tell him that you would be willing to buy it for \$9,000. Your telling John that you would buy his tractor for \$9,000 is a counter-offer, that is you are now making an offer to him. John can either accept or reject this counter-offer. But since you have made a counter-offer, you can't at a later date accept John's original offer, that is, his offer to sell you his tractor for \$10,000. Your counter-offer destroys John's original offer. But you could, at a later date, offer to pay \$10,000 for the tractor. John could then accept or reject your offer.

Q. WHAT HAPPENS IF I HAVE MADE AN OFFER TO SELL OR BUY SOMETHING, BUT LATER CHANGE MY MIND? CAN I WITHDRAW THIS OFFER?

You can revoke or terminate your offer at any time before it is accepted. But how do you revoke or terminate your offer? The revocation of an offer is ineffective unless it has been communicated to the offeree. Therefore it will not be enough that you have changed your mind, but you must also tell the offeree that your offer no longer stands. Even if you have promised that your offer will remain open until a certain date it can still be revoked, unless the offeree has paid you money for this promise. (This would be a separate contract, that is, a contract to keep your offer open until a certain date. This is often referred to as an "option".)

Q. CAN ANYBODY MAKE A BINDING CONTRACT?

An "infant" is anyone who is under the age of majority (18 in Manitoba). As a general rule, most contracts entered into by infants are voidable, but it is only the infant who can decide to get out of the contract. Contracts made by an infant for "necessaries" or contracts for employments on terms beneficial to the infant are not voidable, but can be enforced. "Necessaries" refer to articles and services necessary to support one's life. An infant can avoid a contract for non-necessaries at any time before he reaches the age of majority, or within a reasonable period of time after reaching the age of majority.

A person who was intoxicated at the time he entered into a contract may have this contract set aside if he can show that his drunkenness had progressed to the extent of rendering him incapable of understanding what he was doing.

Contracts of an insane person may also be set aside.

A corporation may enter into a contract as if it were a natural person.

Q. WHAT TYPES OF CONTRACTS MUST BE IN WRITING?

Not all contracts must be in writing, so therefore one can enforce an agreement even though it wasn't in writing. But contracts in relation to certain matters must be in writing in order that they may be enforced.

The Statute of Frauds states that the following contracts must be in writing: 1) contracts by executors and administrators for payment of debts out of their own estate; 2) contracts of guarantee; 3) agreements in consideration of marriage; 4) agreements relating to land; and 5) contracts that are not to be performed within one year from the time of their making.

The Sale of Goods Act states that no contract for the sale of goods with a value of \$50.00 or more shall be enforceable unless one of the following alternatives has been satisfied.

The first alternative is that the buyer accepts part of the goods sold, and actually receives them.

The second alternative is that the buyer gives the seller full or part payment at the time of the contract, and this is accepted by the seller as indicating the completion of the agreement.

The third alternative is that some written agreement is made and signed by the party who is attempting to enforce the contract. The above applies to every contract, even if the goods are to be delivered in the future, the goods are not in existence or in the hands of the seller at the time the contract is made, or the goods were not ready for delivery at the time the contract was made.

The Farm Machinery and Equipment Act states that where new farm machinery and equipment is sold, the contract for the sale must be in writing.

The Consumer Protection Act states that every retail sale of goods or services on credit in which there is any cost of borrowing payable by the buyer, the contract must be in writing, and signed by the buyer. This applies except when a sale is made on variable credit or a sale in which the cost of borrowing does not exceed \$10.00. The Act also provides that every retail hire-purchase of goods in which the cost of borrowing exceeds \$10.00 shall be evidenced in writing and signed by the buyer.

No particular form of written agreement is required, but the written agreement must contain all of the essential terms of the contract. The essential terms are: the parties; the property; and the price.

Q. CAN I GET OUT OF A CONTRACT ONCE IT HAS BEEN MADE?

There are a limited number of instances in which one can be released from the obligations under a contract. Some possible situations will be discussed, but it would be incorrect to believe that you can easily be released from your contractual obligations. For the most part, once a contract has been entered into, it is binding on all parties. For further information on this area consult your lawyer.

Mistake

If both parties to a contract make the same mistake about some underlying and fundamental fact, the court will set the contract aside. This could occur where the parties are unaware that the subject matter of their contract has been destroyed. This can be better explained with an example.

Say on July 15, 1982 you contract to sell your combine to John Jones, but later discover that the combine has been destroyed by fire on July 1, 1982. Because of the mistaken belief that the combine was in existence on the date of sale, a court would set this contract aside.

A mistake could also occur where the parties misunderstand each other. This could occur where you have two trucks, a Ford and a Dodge, and want to sell the Dodge. Your neighbour, John Jones, believes you want to sell the Ford. In this case the contract could be set aside because no real agreement has been reached.

If one party, in entering into a contract, is acting under a mistake known to or induced by the other party, the contract is voidable by the mistaken party.

Frustration

Frustration comes into play when, after the parties have made a contract, something unforeseen happens which prevents the completion of the contract. This doctrine applies only to changes which occur after the formation of the contract, and does not apply to unexpected facts which existed at the time of the contract, but which the parties were unaware of.

Frustration could occur in the following situation. Your neighbour agrees to rent his tractor to you for a week. Before the time agreed upon the tractor is destroyed by fire. In this case the court would probably find that you and your neighbour have contracted on the basis of the continued existence of the tractor, so that when the tractor was destroyed without fault of either party, both parties will be excused from their obligations.

The doctrine of frustration will probably not apply in the following situations: 1) where the supervening event resulted from the voluntary acts of one of the parties; 2) the possibility of the supervening event arising during the term of the contract was contemplated by the parties; or 3) the contract provides for the occurrence of the supervening event.

Misrepresentation

A representation is a statement of fact made by one party to the other party which, while not forming a term of the contract, is one of the reasons that induces the receiver of this information to enter into the contract. A "misrepresentation" is a representation that is untrue. A misrepresentation could occur as a result of fraud, negligence, or an innocent act.

Where a misrepresentation has induced the formation of a contract, it may be possible to have the contract set aside. If you are the person that has been induced to enter into a contract because of a misrepresentation, you will not be able to have the contract set aside if any of the following apply: 1) you have affirmed the contract; 2) if an unreasonable amount of time has lapsed; 3) if the parties to the contract can't be restored to their original positions; or, 4) if to set aside the contract would be to deprive a third party of a right in the (subject matter of) the contract which he has acquired in good faith and for consideration. You may also be able to collect damages if you have suffered a loss due to the other parties' fraudulent or negligent misrepresentation.

Duress

Since a contract is formed as a result of consent between the parties, no contract can be made if duress is present. "Duress" refers to actual violence or threats of violence to the person. If you can show that you entered into a contract under duress, the contract may be set aside.

Undue Influence

Contracts will be set aside if you can show that there was undue influence. "Undue influence" describes a situation where one is induced to do some act which he would not have done if he had been left to act freely. It occurs because of some unfair and improper conduct. Such a situation could arise in the following situations, where mutual trust and confidence is required: lawyer and client; parent and child; trustee and beneficiary; or religious advisor and follower.

Breach of a contractual term by the other party

The terms of a contract may be divided into two main classes: conditions, and warranties. "Conditions" are terms that are considered to be more important in the contract, whereas "warranties" are considered to be less important. If a condition is breached, the innocent party may be discharged from having to carry out his obligations under the contract. If a warranty is breached, the innocent party is only entitled to damages (warranty in this context should not be confused with a warranty used to guarantee quality). Damages could also be awarded for a breach of a condition. (For a more detailed discussion on damages, see next question.)

The following example will help to explain this. Say you contract for the purchase of a certain type of truck, with all of the available accessories. At the time you are to take delivery of the truck, you discover that some minor accessory has been omitted. A court would probably find that this is a breach of a warranty on the part of the seller, so that you will be unable to treat the contract as being at an end for such a trifling breach. But if on the other hand you discover that the engine is considerably smaller than that contracted for, this is important enough that a court would probably find the size of the motor to have been a condition of the contract, so that you would now be discharged from having to carry out your obligation under the contract.

Discharge by Agreement

The parties to a contract may make a new contract which extinguishes the rights and obligations that have been created by the previous contract.

Non est factum

The term "non est factum" is a defence that you can use where you have been induced by a false statement of another to sign a written document containing a contract which is fundamentally different in character from that which was contemplated. This could occur in a situation where an illiterate person signs a document, believing it to be a will, but it turns out to be an agreement for the sale of land. In such a case the contract will be set aside. It must be noted that this situation rarely occurs.

Q. WHAT CAN I DO IF THE OTHER PARTY TO OUR CONTRACT BREACHES A TERM OF OUR CONTRACT?

(Before reading the answer to this question, it would be of benefit to read the above question and answer.)

As outlined above, if the other party breaches an important term of the contract (a condition) you may be discharged from having to carry out your obligations under the contract. But this is not the only possible remedy. For example you may be awarded damages, in addition to being discharged from your obligations, or instead of being discharged from your obligations.

Damages

"Damages" is a sum of money recoverable for a breach of a contract. Damages are awarded in contract in order that the harmed party can be placed, so far as money can do it, in the same position he would have been in if the contract had been performed.

Only damages can be awarded if the term breached is a warranty. Damages can also be awarded in the following situations: delay in delivery of goods; delivery of defective goods; or non-delivery of goods.

Rejection of the goods

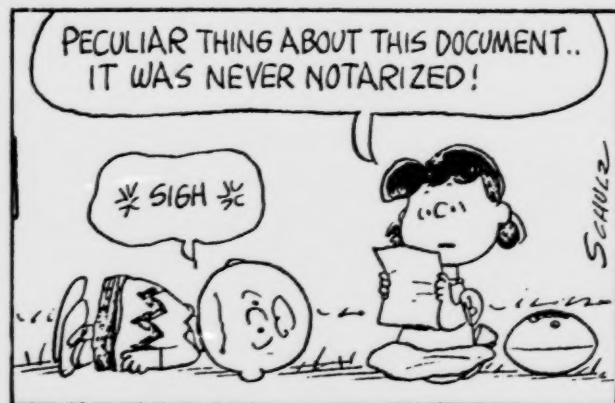
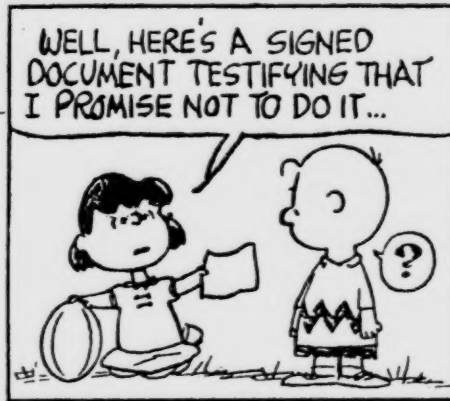
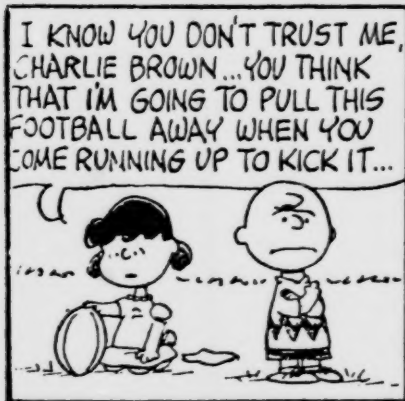
The right to reject the goods may be exercised when the seller has been guilty of a breach of a condition in the contract. Certain types of misdelivery will also entitle the buyer to reject the goods offered by the seller, either in whole or in part. This could occur where the wrong quality of goods are delivered, or too much or too little is delivered.

The right to reject the goods for a breach of condition may be lost. This right could be lost in the following ways: the buyer has elected to waive the breach; by acceptance of the goods; or by selling the goods to a third party.

Specific Performance

In many cases none of the above remedies will be satisfactory. This would occur, for example, if you contract for the purchase of land, and the seller fails to carry out his obligations, including the transfer of the land to you. It may be that damages will be an inadequate remedy, and therefore you would want a decree of specific performance.

A decree of "specific performance" is a decree issued by the court which orders a contracting party to do that which he has promised to do. A decree of specific performance will not be issued for contracts of personal service, such as employment. The decree will only be granted after the court has weighed the hardship to each party, and then decided that it would be fair to grant it.



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INSURANCE

Q. WHAT EXACTLY IS A CONTRACT OF INSURANCE?

A contract of insurance (for a discussion on contract law see chapter on contract law) may be defined as a contract where one person (the insurer - the insurance company) undertakes in return for an agreed sum of money (the premium) to pay to another person (the insured - you) a sum of money (or its equivalent) on the happening of a specified event (the happening of the event which will cause you a loss). The specified event must have some element of uncertainty about it. In Manitoba this contract of insurance will be governed by provincial statute, and therefore must comply with the applicable statute. The "policy" which you receive is the instrument which evidences the contract (that is, specifies what the contractual terms are).

Q. IF I BUY SOMETHING THAT HAS BEEN INSURED BY THE SELLER, AM I PROTECTED?

A contract of insurance is said to be a personal contract. This means that the contract does not run with the subject matter of the insurance (the object insured). This can be better explained with an example. Say you buy a tractor from John Jones. John has insured this tractor against loss by fire and hasn't cancelled the policy at the time of the sale. Some time after you have paid John for this tractor and taken delivery of it, but before you have purchased insurance, it is destroyed by fire. So you ask - "Am I covered by John's insurance?" The answer is no, because you don't have a contract of insurance.

So you ask, "Can John recover, and then turn over to me the insurance money that he receives?" Again the answer is no, because after John has sold the tractor he has no "insurable interest" in it. (See principle No. 2 below.)

This is not to be confused with the situation where there is an "assignment" of the proceeds of the policy. This occurs where the insured (the person buying the insurance) agrees to have the insurance company pay the money to a third party. (For example, to a bank or mortgage company who may have lent the money to the insured to buy the asset.) The money may be assigned to anyone and this can't be prevented by the insurance company.

If it can be shown that the seller has purchased insurance for the buyer, the buyer may be protected, but it is still always best to have your own insurance contract.

Q. WHAT CAN I INSURE?

A contract of insurance is void if the insured doesn't have an "insurable interest" in the subject matter of the insurance. In regard to property, a person has an insurable interest in it when he "sustains such relations with respect to it that he has a reasonable expectation, resting upon the basis of a legal right, of a benefit to be derived from its continued existence, or of loss or liability from its destruction". This definition sounds complicated, but can be understood by looking at the following examples.

A fellow named Colp lived in and insured a house owned by his brother. It was held that a mere right of possession was not enough to create an insurable interest in the house. The court said that Colp would have to acquire some legal interest in the property before he would have an insurable interest.

In another case a fellow (M) owned a timber estate. He later formed a corporation. All the shares in this corporation were owned by M. The lumber was sold to the corporation. The timber was insured by M, but not by the corporation. A fire destroyed all of this lumber after it was sold to the corporation. It was held that a shareholder has no insurable interest in the assets of the corporation, and therefore M was unable to recover for the loss of the lumber.

So in effect, you generally can't insure property owned by someone other than yourself.

There may be a tendency lately for the courts not to be so restrictive in their application of this principle, but I would suggest that if you are in doubt, you should explain the circumstances fully to your insurance company and/or consult your lawyer.

In regard to fire insurance The Insurance Act says that *unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the contract*. So in other words if you are going to insure property owned by someone other than yourself, you must inform the insurance company of this.

In regard to life insurance, there is an insurable interest where there is a reasonable expectation of a money benefit, and it need not be based on a legal right. The Insurance Act gives a non-inclusive list of situations where one has an insurable interest in the life of another. They are: a child; a grandchild; a spouse; any person upon whom he is wholly or in part dependent for, or from whom he is receiving support or education; his employee; and any person in the duration of whose life he has a pecuniary interest.

Q. WHEN MUST THE INSURABLE INTEREST EXIST?

In regard to property insurance, the insurable interest must exist at the time of the loss, but need not exist at the time you take out the insurance. With regard to life insurance, the insurable interest must exist at the time the contract is made, but need not exist at the time of the loss (death).

In effect, this principle has been established to prevent wagering on uncertain events. It is felt that it is against public policy to allow you to insure the life of - say some prominent public figure (unrelated to you of course) in the hope that he or she will meet an untimely death, or to insure your neighbour's house against fire, in the hope that it will burn down.

Q. HOW MUCH CAN I RECOVER?

This principle simply states that the insured can recover no more than the loss. This principle, while applying to property insurance, doesn't for the most part apply to life insurance. Since it is impossible to value life, a life can be insured for an unlimited amount (there may be a limit in an employer-employee situation, so that an employer could only recover the value of the loss of the employee).

Assume a situation where you sell your tractor to John Jones, and the agreement says that the tractor is at John's risk even though it hasn't yet been delivered to him. Assume also that you have insured this tractor against loss by fire, and it is destroyed by fire after you have made a valid contract of sale with John. You can't recover under your fire insurance policy because you have suffered no loss, because John has already paid to you the full value of this tractor (the principle would be the same even if John hasn't actually paid you the money, but still owes it to you).

The same principle applies in a situation where you have a tractor worth \$10,000, you insure it for \$12,000, and it is later completely destroyed. You can recover no more than \$10,000.

This principle is not to be confused with the situation where you purchase what is called a "valued policy". With this type of policy, you and the insurance company pre-determine the value of the property to be insured. If this property is destroyed, you recover the pre-determined amount, and it does not matter that this pre-determined value is greater than its actual value.

Q. DOES AN AMOUNT OF MONEY RECEIVED BY WAY OF A GIFT HAVE TO BE TAKEN INTO ACCOUNT?

Say you insure your tractor against loss by fire and it is later destroyed by fire, but a rich uncle gives you money equal to the value of the destroyed tractor - "so that you will suffer no inconvenience by being without a tractor". Does the principle of indemnity come into play so that you can recover no insurance proceeds? Probably not. It has been suggested that a gift received by the insured shall not be taken into account under the indemnity principle. But where the insured has a legal right to the proceeds in question, the proceeds are clearly accountable under the principle of indemnity.

Q. IF MY PROPERTY IS COVERED BY, SAY FIRE INSURANCE, AND IT IS DESTROYED DUE TO THE NEGLIGENCE OF A NEIGHBOUR, CAN THE INSURANCE COMPANY SUE THIS NEIGHBOUR? WHAT IF I NEGLIGENTLY CAUSE THE LOSS TO MY OWN PROPERTY?

Subrogation is the substitution of one person for another in the pursuit or enforcement of a lawful claim or right. This can be further clarified by an example. Say you insure your barn against loss by fire. A neighbour negligently starts a fire which spreads to your land, and ultimately destroys your barn. The principle of subrogation allows your insurance company to sue this negligent neighbour, in your name, after it has paid you under your insurance contract (if you have no insurance, you can sue this negligent neighbour for the recovery of your loss).

If you negligently cause the destruction of your own property, you are still covered, as this is the main reason why one buys insurance (although coverage would be lost if the destruction was intentional). Nor can the insurance company sue you at a later time, as there is no right of subrogation against an insured. Nor is there a right of subrogation in life insurance.

Q. CAN I SETTLE WITH THE PERSON WHO CAUSED THE DAMAGE TO MY PROPERTY, SUCH THAT THE INSURANCE COMPANY IS DENIED ITS RIGHT TO SUBROGATION?

For the most part, if the third party has settled in good faith with the insured, the insurer can proceed no further, unless the third party was notified of the subrogated claim before the settlement.

It must be noted that the right of subrogation can lead to "injustice" at times. For example, say you insure your barn against fire. A fire is started by the negligent act of your employee, which leads to the destruction of your barn. You will be able to recover for your loss, but the insurance company may want to sue your negligent employee for this loss.

You can try to prevent this by insuring on behalf of yourself and your present and future employees or by releasing your employees from liability in their contracts of employment. For further information on this you should consult your lawyer and/or your insurance company.

Q. WHEN APPLYING FOR INSURANCE MUST I TELL THE INSURANCE COMPANY EVERYTHING?

Since insurance is a contract based upon speculation, there is a duty on the applicant to make full and free disclosures of all of the facts that could in any way affect the making of the contract.

SOME IMPORTANT AREAS WHERE CARE IS REQUIRED

FIRE INSURANCE

Q. WHAT HAPPENS IF I DON'T TELL THE EXACT TRUTH ABOUT THE PROPERTY TO BE INSURED?

The Insurance Act provides that certain terms are part of every contract of fire insurance. One such term says that *if any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge the risk to be undertaken, the contract shall be void as to any property in relation to which the misrepresentation or omission is material.* In other words you must correctly describe the property to be insured, you must not accidentally mistate any important facts that you know about, which the insurance company requires to judge the risk undertaken, and of course you must not intentionally omit to inform the insurance company of some important fact. It has been held that an innocent misrepresentation is sufficient to avoid a claim. With regard to misrepresentations, the representations include all necessary and natural inferences from the representation.

To give an example - there is a Saskatchewan case where a farmer insured his bull in October 1970. In June 1970 the farmer had taken this bull to the vet because the bull was walking with a peculiar movement of his hind legs. Nothing abnormal was found. When the application for insurance had been made in October the farmer signed a declaration which stated that the bull was in a sound state of health, had been free from illness during the past 12 months and had been free from lameness or other abnormality during the same period. In November 1970 the bull was taken back to the vet, a spinal cord degeneration was diagnosed, and the bull had to be destroyed. The insurance company refused to make payment for any loss under the policy contending that it had not been advised about the bull's peculiar walk and that there had been a misrepresentation. It was held that there was a misrepresentation of facts material to the risk in the declaration of health signed by the farmer, and therefore the contract of insurance was void (even though the example given involved livestock insurance, the term in question applied to both fire and livestock insurance).

Q. WHAT HAPPENS IF I INSURE PROPERTY OWNED BY SOMEONE ELSE?

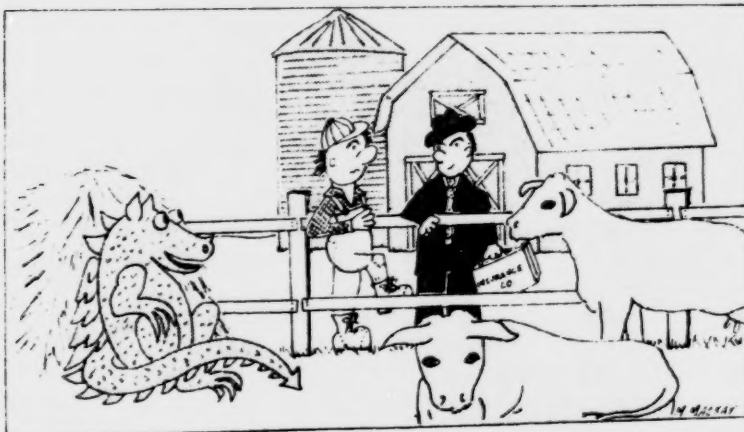
The Act states that *unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person in the contract.* So in other words, if you are going to insure property owned by someone other than yourself, you must inform the insurance company of this (see also Principle No. 2 - Insurable Interest).

Q. WHAT HAPPENS IF I MAKE ALTERATIONS TO MY PROPERTY AFTER I HAVE INSURED IT?

The Act also says that *any change material to the risk and within the control and knowledge of the insured shall avoid the contract as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent...* In other words, if you make any important changes to the insured property you must notify the insurance company or its local agent, and if you fail to do this you will lose your coverage.

But what is a change material to the risk? It has been held that where a home is insured, and is later used for gambling and selling bootleg liquor, there has been a material change to the risk. The renovation to the ground floor of a residence and its subsequent use as a store was held to be a change material to the risk. Any change in use, structural alteration, or the subsequent storage of dangerous products in a building would be examples of changes material to the risk.

The insuree, upon the occurrence of any loss of or damage to the insured property, must immediately give notice of this in writing to the insurer. The insured must also, as soon as possible, deliver to the insurer proof of the loss. For further details in this regard consult your lawyer and/or insurance company.



What do you mean he's a material change to the risk?

AUTOMOBILE INSURANCE

Q. WHAT HAPPENS IF I DON'T TELL THE EXACT TRUTH TO THE AUTOMOBILE INSURANCE COMPANY?

The Manitoba Public Insurance Corporation Act provides that where (a) an applicant for an owner's certificate has falsely described the motor vehicle or trailer in respect of which the application is made to the prejudice of the corporation; or (b) an applicant for an owner's certificate or driver's certificate knowingly misrepresents or fails to disclose in the application a fact required to be stated therein; or (c) an insured violates a term or condition of any plan; or (d) an insured commits a fraud in respect of this Act; or (e) an insured makes a wilfully false statement with respect to a claim under any plan; any claim by or in respect of the applicant or the insured shall be rendered invaled... In other words, you must correctly describe the vehicle to be insured, you must not knowingly misstate a fact in any application to the insurance company, you must comply with the terms of your insurance contract, and you must not intentionally make any false statements if you are making claim under the Act. If you do any of the above your coverage may be lost.

Again, as with fire insurance, the insured must provide notice and proof of loss to the Corporation upon the occurrence of any loss or damage. As this insurance also includes public liability coverage, the insured must promptly provide the corporation with written notice containing all available particulars of any accident involving loss or damage to the persons or property of others, and of any claim made in respect of any such accident... In other words if you are involved in an accident which causes damage to the property of others or causes injury to someone else, you must promptly notify the insurance company of this and at the same time give them all available information.

LIFE INSURANCE

Q. WHEN I APPLY FOR LIFE INSURANCE, MUST I DISCLOSE EVERYTHING ABOUT MY HEALTH TO THE INSURANCE COMPANY?

The Insurance Act provides that an applicant for insurance and a person whose life is to be insured shall each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within his knowledge that is material to the insurance and is not so disclosed by the other.

The failure to disclose, or a misrepresentation or the above will make the contract voidable by the insurer. It would appear that because of the use of the word "shall", the applicant must disclose all material facts, even if the insurance company doesn't specifically ask a question relating to that matter.

CROP INSURANCE

Q. IS IT POSSIBLE TO LOSE MY COVERAGE?

The Crop Insurance Act says that the contract for insurance is void in respect of any part of the deficiency in yield or of any loss caused by poor quality that is due to the negligence, neglect, misconduct, or poor farming practices of the insured person... The Act goes on to say that if an insured person suffers a loss against which he is insured under a contract, he shall notify the agency of the occurrence of the loss within the time and in the manner specified in the contract. The Act also makes it an offence to give any false information or to make a false statement in any application, declaration or return or to omit information from an application, declaration or return so as to make it misleading.

FILLING IN THE APPLICATION FORM

Q. WHAT HAPPENS IF THE INSURANCE AGENT WHO FILLS IN MY APPLICATION FORM MAKES A MISTAKE AND I SIGN IT WITHOUT NOTICING THIS MISTAKE?

A problem can occur where the applicant allows the insurance agent to fill in the application, the agent makes a mistake, and then the applicant signs the application without reading it. There is usually a term that says that the applicant declares that the answers given are in every respect true and correct. The insurance company may now attempt to avoid the contract on the basis of a misrepresentation.

To get around this problem the insured must attempt to prove that the agent was acting on behalf of the insurance company, so that the mistake of the agent is a mistake of the insurance company. In days past the courts would say that if you sign an application form warranting the truth of it, you are bound by it, and would thus lose your coverage. In recent times the courts have taken a more lenient approach, but you can't always count on this. So I would suggest that a few minutes spent checking the accuracy of the insurance agent's written answers will be time well spent, and could prevent the possible loss of coverage in the future.

CO-INSURANCE CLAUSE

Q. WHAT HAPPENS IF I PURCHASE AN INSURANCE POLICY WHICH IS FOR LESS THAN THE ACTUAL VALUE OF MY PROPERTY?

A co-insurance clause is one of the methods used to counter the tendency of an insured to under-insure his property, in the belief that if damage occurs to his property, it will be less than total destruction. Most policies generally require that you insure your property for at least

80% of the value of the insured property. If this isn't done, you (the insured) must bear a proportion of the loss. This can be better explained with an example. Say we have the following facts:

- property valued at \$100,000
- value of insurance policy \$60,000
- value of damage \$10,000
- and 80% co-insurance clauses

The formula is:

Amount recoverable = $\frac{\text{value of insurance policy}}{\text{insurable value designated by the co-insurance clause}}$ X value of the damage

Insurable value designated by the co-insurance clause = value of the asset X co-insurance figure
= 100,000 X 80%
= 80,000

recoverable = $\frac{60,000}{80,000}$ X 10,000

= \$7,500

Care here is especially important in times of inflation, where the value of an asset appreciates over time, but the insured simply renews a policy taken out in an earlier year.



"You sure put one over on us, Mr. Johnson. We thought we had you covered... ha-ha... for every type of accident!"

BUSINESS ORGANIZATIONS

TYPES OF BUSINESS ORGANIZATIONS

This chapter will examine various types of business organizations. The examination will include a general description of the organization; a discussion of the formation, operation and termination of the business; and a discussion of some of the advantages and disadvantages of each. The tax implications will be discussed in greater detail in the chapter on taxation.

SOLE PROPRIETORSHIP

A sole proprietorship is the simplest and most common business organization. This type of business is owned by only one person, and this owner has all of the legal rights and responsibilities associated with it. The revenue and expenses of this business are included in the owner's personal tax return.

Q. WHAT ARE THE ADVANTAGES OF A SOLE PROPRIETORSHIP?

This type of business organization is easy to form and organize. There is no special legislation which governs this area. It is inexpensive to create and dissolve. Accounting procedures are straight-forward, and the tax implications are less complicated than those that apply to partnership and corporations. Unlike an employee, a sole proprietor can deduct from income, expenses associated with the operation of the business. Any loss from the business can be used to offset other personal income (this can't be done with a corporation).

A sole proprietorship does not have to pay a Capital Tax, as does a corporation (family farm corporations are exempt from this).

The owner doesn't have to register the business name if he uses the family name, for example, Jones Farming. But if the owner uses a name other than the family name, for example, Big Valley Farming, or if the business name indicates that more than one person is involved in the business, for example, Jones and Smith Farming, the name must be registered under The Business Names Registration Act.

Q. WHAT ARE THE DISADVANTAGES OF A SOLE PROPRIETORSHIP?

Because a sole proprietorship is not a separate legal entity, the owner can be held personally liable for all debts of the business or civil wrongs (torts) committed by the employees in the course of their employment. Therefore, personal assets can be seized for the non-payment of debts.

Upon the owner's death the business comes to an end, and it may be possible that the estate will have a capital gains tax so large that the business or some of its assets might have to be sold to pay the tax.

One person acting alone may be limited in the amount of capital that can be raised. In regard to management, while the owner need not take orders from anyone, the owner for the most part, is restricted to his/her own expertise.

PARTNERSHIP

A partnership is defined as a relationship which exists between persons carrying on a business in common with a view to profit, but does not include the relationship between shareholders of a corporation.

Q. IS A PARTNERSHIP CREATED WHENEVER PEOPLE WORK TOGETHER?

A "legal partnership is not created (in the legal sense) whenever people work together. As will be seen later, there will be situations where we will want to show that a partnership hasn't been created. So then, how do we determine whether or not a partnership has been created?

To begin with, a partnership must satisfy the requirements of the opening definition. We could have a situation where the parties are only co-owners, and have established this relationship in order to maximize their individual profit. The Partnership Act lists some rules for determining the existence of a partnership.

Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership, even if the owners share in the profits (for more information on land ownership, see the chapter on land law). The receipt of a share of profits does not of itself make a person a partner in a business. The fact that a lender of money receives a rate of interest varying with the profits or receives a share of the profits does not make the lender a partner if the contract is in writing.

Q. HOW DOES ONE CREATE A PARTNERSHIP?

A partnership can come into existence either through a written or oral agreement, or by implication from the conduct of the parties. It is based on a contractual relationship. An infant (someone under 18) can be a partner, but the infant is not liable for debts. An infant can bind the partnership.

A partnership must be registered in accordance with The Business Names Registration Act.

It is advisable that a written partnership agreement be drawn up, as this will aid in the settlement of any future disputes. The purpose of this agreement is to set out the rights and responsibilities of the partners, the capital to be contributed by each partner, the division of profits and losses, the time that each partner will devote to the business, and provisions for termination of the partnership, and provisions for the retirement or death of partners.

The partnership agreement should be drafted by a lawyer. To ensure fairness, it is advisable that each partner be represented by a separate lawyer at this stage. The following areas should be covered in the agreement:

- 1) the name of the partnership, and who has the right to on dissolution;
- 2) set out the scope of the partnership business;
- 3) the date when the partnership will begin and terminate (if applicable);
- 4) define the capital of the partnership, and how much each is contributing. The agreement would also describe how much each is entitled to on dissolution (if no provision is made, the capital will be divided evenly between the partners on dissolution);
- 5) banking arrangements, that is where, how and who will sign the cheques (in the absence of an agreement to the contrary, all partners have equal power);
- 6) provisions for the division of profits and losses (in the absence of an agreement to the contrary, will be divided equally);
- 7) who is to make the decisions;
- 8) a provision permitting the making of drawings by partners, in advance of the division of profits;
- 9) introduction of new partners and the retirement of old partners;
- 10) how the accounts are to be kept;
- 11) what happens if a partner dies or goes bankrupt;
- 12) how the partnership can be dissolved;
- 13) describe what is partnership property, and what property is owned by the individual partners;
- 14) restrictive covenants, that is, terms which will restrict the commercial activities of the partners or a former partner outside the partnership;
- 15) what happens if someone becomes ill and can't perform his functions;
- 16) may be desirable to have an arbitration clause in case a dispute arises.

Q. WHAT ARE THE RIGHTS AND OBLIGATIONS OF THE PARTNERS?

Many of these rights and obligations will be set out in the partnership agreement. The Partnership Act sets out the rights and duties of the partners, but these may be varied by agreement.

Because partners are given broad powers to bind the partnership, and thus the other partners, there exists what is called a "fiduciary duty" between the partners. This means that there is a duty to act in the utmost good faith. That is, the parties must act with complete honesty and loyalty towards each other.

THE RIGHTS AND OBLIGATIONS OF THE PARTNERS, AS SET OUT IN THE PARTNERSHIP ACT

1) Every partner who does any act while carrying on the business in the usual way binds the partnership. This does not apply if the partner had no authority to act in this particular manner and the person with whom the partner was dealing knows of this limitation.

2) Every partner is liable jointly and severally with the other partners for all debts and obligations of the firm incurred while a partner, and if the partner should die, the estate of the partner becomes liable for the unsatisfied debts and obligations.

3) Every partner is liable jointly and severally with the other partners for any wrongful act or omission of any partner acting in the ordinary course of business, or with the authority of his or her co-partners. This would occur where a non-partner is injured or some penalty is incurred.

4) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses sustained by the partnership (subject to agreement).

5) The partnership must indemnify every partner in respect of payments made and personal liabilities incurred by a partner, (a) in the ordinary and proper conduct of the business of the partnership, or (b) in anything necessarily done for the preservation of the business or property of the partnership.

6) If a partner makes any advance to the partnership in excess of the amount of the capital which he or she has agreed to contribute, the partner is entitled to interest of 5% per year from the date of the advance (unless otherwise agreed).

7) A partner is not entitled to interest on capital contributions, unless otherwise agreed.

8) Every partner may take part in the management of the partnership business, unless otherwise agreed.

9) No partner shall be entitled to be paid a salary for acting in the partnership business.

10) No person may be introduced as a partner without the consent of all existing partners, unless otherwise agreed.

11) A person who is admitted as a partner into an existing partnership does not become liable to the creditors of the partnership for anything done before becoming a partner.

12) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before retirement. But this retiring partner may be discharged from any existing liabilities, by making such an agreement between him/herself, the members of the new partnership, and the creditors.

13) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners, unless otherwise agreed.

14) The partnership books are to be kept at the place of business and every partner may have access to and inspect and copy any of them, unless otherwise agreed.

15) A majority of the partners can't expel any partner, unless a power to do so has been created in the partnership agreement.

16) Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or the legal representative of a partner.

17) Every partner must account to the partnership for any private profits made by him without the consent of the other partners from any transaction concerning the partnership, or from any use by the partner of the partnership property, name, or business connection.

18) Where a partner, without the consent of the other partners, carries on any business of the same nature as, and competing with, that of the partnership, the partner must account for and pay over to the firm all profits made by a partner in that business.

Q. HOW CAN A PARTNERSHIP BE DISSOLVED?

The Partnership Act outlines the ways in which a partnership may be dissolved.

Where no fixed term has been agreed upon for the duration of the partnership, any partner may bring the partnership to an end by giving notice of his intention to do this to all of the other partners (it goes without saying that a partnership could be dissolved by agreement between the partners).

A partnership, unless agreed otherwise, is dissolved, if entered into for a fixed term, by the expiration of that term; or if entered into for a single adventure or undertaking by the termination of that adventure or undertaking. A partnership, unless agreed otherwise, is also dissolved by the death, bankruptcy, or insolvency of any partner.

A partnership may, at the option of the other partners, be dissolved if any partner allows or permits his share of the partnership property to be charged for his separate debt.

A partner may also apply to a court to have the partnership dissolved. The partnership may be dissolved in the following situations: 1) a partner is of permanently unsound mind; 2) a partner becomes permanently incapable of performing his part of the partnership contract; 3) a partner has been guilty of misconduct; 4) a partner wilfully or persistently commits a breach of the partnership agreement; 5) the partnership can only operate at a loss; or 6) the court believes that it would be just and equitable to do so.

Q. WHAT ARE THE ADVANTAGES OF A PARTNERSHIP?

A partnership is simpler and less expensive to form than a corporation. It allows for the pooling of talent and capital.

In regard to taxation, the expenses of operating and acquiring the business are allowed as business deductions. The sale of the business can give rise to a capital gains tax which is given preferential tax treatment.

Q. WHAT ARE THE DISADVANTAGES OF A PARTNERSHIP?

A general partner is personally liable for all of the debts, obligations, and wrongful act of the other partners which occur in the course of the business, whether or not the acts are authorized. Therefore, personal assets can be seized for the non-payment of liabilities.

The partnership must be ended and reconstituted whenever a partner leaves or a new partner is added. The cost of "buying out" a departing partner may put a tremendous financial strain on the firm.

The "small business deduction" allowed under the Income Tax Act applies only to corporations or corporate partnerships, but not to unincorporated partnerships.

Under the Income Tax Act a partner is deemed to have received all of his or her proportionate share of the partnership income even if all the money has not been drawn out.

Profits of a partnership become part of each partner's personal income and are not taxed at a preferential rate.

Q. IS THERE ANY WAY IN WHICH A PARTNER MAY LIMIT HIS LIABILITY?

The above discussion covers what is termed a "general partnership". The Partnership Act provides that a "limited partnership" may be formed. To form a limited partnership there must be at least one general partner and one limited partner. Limited partners are not liable for the debts of a limited partnership beyond the amount of capital that they have contributed. A limited partner is not entitled to limited liability until the partnership is registered in accordance with The Business Names Registration Act.

The Act provides that only general partners are authorized to bind the partnership. But where a limited partner, with the knowledge of the general partners, takes part in the management of the partnership business, such partner has the power to bind the partnership.

The Act also states that where a limited partner takes an active part in the business of the partnership, such partner is liable as if a general partner, to any person with whom the partner deals on behalf of the partnership and who does not know that he or she is a limited partner, for all of the debts of the partnership.

Limited partnerships are seldom used because of the regulations concerning non-involvement in the management of the business.

CORPORATION

A corporation (sometimes referred to as a company) is an artificial person created by law. A corporation is a separate legal entity, that is, it is separate and distinct from its owners, the shareholders. The corporation is not the shareholders with another name. Because a corporation is a legal person it has rights and duties under the law. A corporation can own property, it can sue and be sued, and it must file its own income tax return. A corporation does not cease to exist when its owners (the shareholders) die. In Manitoba a corporation may have as few as one shareholder. The separate entity concept can be illustrated by the following example:

John Jones is a farmer and he decides to go into the poultry business. He incorporates a corporation called Jones Poultry Farms Ltd. He invests or lends money or moneys worth in or to the corporation. Jones Poultry Farms Ltd. then buys all of the equipment and birds required to begin the operation. Several months later when all is going well with Jones Poultry Farms Ltd., John Jones decides that he wants chicken for supper, so he goes to the barn and "takes" two.

Now it is possible that John Jones could be charged with the theft of two birds from Jones Poultry Farms Ltd. (assuming that the corporation hasn't authorized this "taking"). This can occur because the two entities in question, John and his corporation, are separate, because the corporation is an artificial person. The birds, etc., belong not to John, but to the corporation. John will no doubt be a shareholder of this corporation, but a shareholder is only entitled to a distribution of the profits of the corporation, not to its assets while it is a going concern.

A shareholder's share measures his interest in the corporation. This interest is a right to a proportionate part of the assets by way of dividends or distribution of the corporation's asset's cash value on winding up.

A share also measures liability in that a shareholder's liability is limited to the price he paid for the share. That is, the corporation has no right to demand more money from a shareholder after he has purchased a share. Thus if a corporation makes a bad deal and loses money and is about to go bankrupt, it can't demand money from the shareholders to prevent this (the same would apply if a corporation was successfully sued; but was unable to pay the full amount of the judgement). Because of this a shareholder's liability is said to be limited.

The corporate "separate entity" principle is not inscribed in stone, however. Sometimes a court will disregard the separate entity of a corporation and look at the reality of the situation so that the shareholders are held responsible or accountable for the action of the corporation. This is referred to as "piercing the corporate veil". This doesn't occur that often; it is limited to instances where the separate entity of a corporation is being sued to perpetrate a wrong or an injustice.

A court may be willing to pierce the corporate veil in the following circumstances: 1) a corporation is used to perpetrate a fraud; 2) a corporation is used to evade a just contractual or statutory obligation; 3) an artificial corporation is used to avoid taxes (doesn't apply where a properly constituted corporation correctly applies the existing law); or 4) a corporation has been created expressly to do a wrong to another, or if those in control of the corporation wilfully and expressly authorize the corporation to do a wrong.

It would be incorrect to believe that the corporate veil may be pierced at any time by a court, so that the advantages of incorporation will be lost. It occurs only in those isolated circumstances where injustice would otherwise occur (in many cases the corporate veil will not be pierced even though an injustice does occur).

There are two major players within the corporate structure, the shareholders and the board of directors. The shareholders own an interest in the corporation, and have the right to elect the board or remove it if dissatisfied with its performance. The shareholders do not have the right to manage the corporation, that resides with the board. Generally, a shareholder is entitled to a number of votes equal to the number of shares that he or she owns.

The Corporations Act states that "the directors of a corporation shall (a) exercise the powers of the corporation directly or indirectly through the employees and agents of the corporation; and (b) direct the management of the business and affairs of the corporation". A unanimous shareholder agreement can restrict the powers of the directors. The Act requires that a corporation have at least one director.

The directors elect or appoint the officers (president, secretary, and treasurer) of the corporation who are responsible for the day-to-day operation of the corporation. The officers normally hire or appoint the other employees of the corporation.

Q. HOW DOES ONE CREATE A CORPORATION?

The first question to be answered is - "Where should I incorporate?" This question arises because in Canada a company can be incorporated either federally or provincially. If your business will be operating primarily within one province, say Manitoba, it will be advisable to incorporate provincially, because the procedure is simpler and less expensive. If your business will be operating throughout Canada, it would probably be better to incorporate federally.

The actual paperwork should be done by your lawyer, but there are books available which tell you how you can do it yourself. The following is a brief outline of the actual procedure.

First of all you must choose a name for your corporation. It must not be similar to any other name, nor must it suggest an association with the Royal Family or the federal or provincial government. The application for your corporation name is submitted to the Corporations Branch on a form called a "Name Search and Transmittal Notice". See sample forms.



MANITOBA

- 29 -

FOR DEPARTMENTAL USE ONLY -
Corporation No. -

THE CORPORATIONS ACT
ARTICLES OF INCORPORATION
(share capital)

FORM 1

1 - Name of Corporation

A.B.C. Enterprises Ltd.

2 - The address in full of the registered office (include postal code)

1000 - 405 Broadway Avenue,
WINNIPEG, R3M 2M2

3 - Number (or minimum and maximum number) of directors

Not less than one or more than seven

4 - First directors

Name in full	Address in full (include postal code)
Joseph Pierpont Morgan	1127 Wall Street, WINNIPEG, R3C 3L8

5 - The classes and any maximum number of shares that the corporation is authorized to issue

Common Shares and
Preferred Shares [See Schedule "1"]

The rights, privileges, restrictions and conditions attaching to the shares, if any

-30-

The annexed Schedule "1" is incorporated in these articles.

Restrictions, if any, on share transfers

No share shall be transferred without the written consent of the holders of a majority of the common shares outstanding.

Restrictions, if any, on business the corporation may carry on

N/A

Other provisions, if any

The number of shareholders excluding employees and ex-employees is limited to 50.

Invitations to the public to subscribe for securities of the corporation is prohibited.

The corporation has a lien on shares registered in the name of a shareholder or his legal representative for any debt of that shareholder to the corporation.

I have satisfied myself that, the proposed name of the corporation is not the same as or similar to the name of any known body corporate, association, partnership, individual or business so as to be likely to confuse or mislead.

Incorporators

Name in full	Address in full (include postal code)	Signature
Joseph Pierpont Morgan	1127 Wall Street, Winnipeg R3C 3L8.	

If any First Director named in paragraph 4 is not an Incorporator, a Form 3 "Consent to Act as a First Director" must be attached. State the full civic address in paragraphs 2, 4 and 11 - a P.O. box number alone is not acceptable.

Generally the articles can only be altered by a special resolution of the shareholders, that is they must be passed by a two-thirds majority of those present and voting. These changes are solely within the shareholder's power.

In addition to the articles, a corporation may pass by-laws. The by-laws are the rules for internal management. Since the by-laws relate to the internal management of the corporation, and since the directors have a right and a duty to manage the corporation, the directors have a right to make and alter the by-laws. A by-law is valid from the time the directors pass it, but it ceases to be valid from the date of the next shareholder's meeting if the shareholders fail to confirm it at that meeting. Any similar change in the future is not effective until it is confirmed by the shareholders.

Q. CAN A CORPORATION ISSUE DIFFERENT TYPES OF SHARES?

Each of the following three rights must attach to at least one class of shares, but all need not be found in any one class: 1) the right to vote at shareholder meetings; 2) the right to receive dividends if declared; and 3) the right to receive the value of the remaining property of the corporation upon dissolution.

Therefore, in a situation where a parent and a child form a corporation, and the parent wants to maintain control of the corporation, the parent could be issued the only shares with voting rights.

Shares may be divided into two classes: preference shares and common shares. A corporation need not issue more than one class of shares, but may do so if it chooses.

Preference shares (preferred shares) contain certain preferences or rights that the common shares don't. The rights could include preference in regard to the payment of dividends, return of capital, or conversion to another class of shares, etc. These shares usually have no right to receive the value of the remaining property of the corporation upon dissolution. These shares tend not to increase in value as the corporation prospers, but they are generally considered to be safer shares because their special rights put these shareholders in a more protected position than other shareholders.

Often preference shares carry no ordinary voting rights with regard to the election of directors. In many cases these shares contain a right to dividends at a specified rate per year, in priority to any dividend distribution to common shares. These dividends may be cumulative, which means if they are not paid in a certain year they accumulate and in following years, the dividend arrears must be paid before any dividend to common shareholders can be paid.

Common shares carry no special preference or right. Common shares tend to increase in value if the corporation prospers and decrease in value if the corporation falters, because these shares usually have the right to receive the value of the remaining property of the corporation upon its dissolution. Often, only the common shares have voting rights attached to them.

As can be seen, this area allows great flexibility, in order that your particular requirements can be met.

Q. WHO IS LIABLE FOR CONTRACTS ENTERED INTO ON BEHALF OF CORPORATION BEFORE IT COMES INTO EXISTENCE?

Often contracts are entered into on behalf of and for the benefit of a corporation before it comes into existence. These are known as pre-incorporation contracts.

In Manitoba, a person who enters into a written contract in the name of or on behalf of a corporation before it exists is personally bound by and liable under the contract. The person's liability ceases when the corporation adopts the contract unless: 1) the contract indicates the person is to remain liable; or 2) a court holds the person liable.

Even if the corporation does not adopt the contract, the person will not be liable for it, if the contract expressly exempts the person from liability.

Q. WHAT ARE THE ADVANTAGES OF INCORPORATION?

One of the more important advantages of the corporation lies in the fact that it provides limited liability for the shareholders. But it must be noted that this advantage will be lost in many situations, as most financial institutions and suppliers will not provide credit to the corporation unless they receive a personal guarantee from the shareholders.

The income tax savings may also be an important advantage. If the corporation is carrying on an active business in Canada it will be eligible for what is known as a small business deduction. This will be discussed in greater detail in the chapter on taxation.

As outlined above, a corporation can provide a greater degree of flexibility in the organization and relationship between the owners than other types of business organizations. It can also be used as a vehicle for estate planning (to be discussed in a later chapter).

A corporation may provide a more suitable method for transferring control and ownership of the business from the parent to the children. If shareholders want to transfer ownership, they simply sell their shares, and not the individual assets of the business.

Unlike a sole proprietorship or partnership, a corporation does not end on the death of one of the owners, but has perpetual life.

A shareholder can't bind the corporation in a contract, etc., as can a partner in a partnership. Only the officers and employees of the corporation can do this.

A corporation may find it easier to raise additional capital. A corporation could obtain additional capital for expansion by offering shares for sale. In Manitoba, a private corporation is limited to having fifty shareholders. (Unlike a public corporation, a private corporation can't offer its shares for sale to the general public, or trade them on a stock exchange.)

Q. WHAT ARE THE DISADVANTAGES OF INCORPORATION?

The cost of incorporating a business and maintaining the corporation is the main disadvantage. The Corporations Branch charges a fee of \$147.50 for incorporation, and generally you will want to hire a lawyer for this. The legal fees will be in the neighbourhood of \$500 to \$2,000, depending on the complexity of the corporation. There is also the disadvantage of increased statutory control with a corporation.

The corporation must also file an annual return to the Corporations Branch. Because a corporation is a separate entity, it must file its own income tax return (the shareholder must also file a separate income tax return). The corporation must also make monthly payments of its estimated annual tax.

Losses on a corporation can't be used to offset gains of the individual shareholders, as can be done with a sole proprietorship.

A corporation can't own a principle residence, and therefore the benefits associated with the ownership of a principle residence will be lost. This can be avoided by not having the corporation own your house and the surrounding land.

COOPERATIVES

A cooperative has been defined as "a voluntary, democratically controlled association of persons who operate an enterprise for the purpose of supplying themselves with commodities or services, on the basis that they share any surplus created in carrying on the enterprise substantially in proportion to the use they make of the association."

Like a corporation, a cooperative is a separate legal entity, that is, separate and distinct from its members. Because of this, a cooperative also has the characteristic of limited liability, and therefore the liability of members is limited to the purchase of their shares.

As in a corporation, a cooperative also requires directors. The directors of the cooperative are the persons who have the right and duty to manage the cooperative and take responsibility for such management. The directors are elected by the members of the cooperatives (unlike a corporation, a member is entitled to only one vote, no matter how many shares he owns).

Q. HOW DOES ONE FORM A COOPERATIVE?

A cooperative may be incorporated either federally or provincially. The following discussion will only cover provincially incorporated cooperatives.

Unlike under The Corporation Act, incorporation of a cooperative under The Cooperative Act is not a matter of right. The Act allows the Registrar to exercise control over incorporation, such that the Registrar must be satisfied that the incorporation is advisable.

To apply for the incorporation of a cooperative the applicant must send to the Registrar the articles of incorporation and the draft charter by-laws.

The articles of incorporation must contain the following:

1) authorized capital; 2) conditions of membership; 3) making, amending and repealing by-laws; 4) election, removal and term of office of directors, their duties, powers and remunerations, and the procedure for director's meetings; 5) the procedure in regard to general meetings; 6) terms of the contract between the cooperative and a member; 7) appointment of auditors; 8) holding of referendums on matters of general concern; 9) distribution of any surplus; 10) the refunds and payments to be made to members; and 11) the distribution of the property of the cooperative.

Q. WHAT ARE THE ADVANTAGES OF A COOPERATIVE?

There is limited liability with a cooperative. The cooperative is responsible for its own legal obligation. Members are liable only up to the amount they paid for their shares.

Cooperatives have the usual business expense deductions available to them. A special advantage cooperatives receive is that profits are not taxed if they are allowed to members as patronage dividends - which are based on the amount of business the member does with the cooperative. Profits not so allocated are taxed.

A cooperative may be financed through the sale of shares.

A cooperative does not end on the death of any of its members.

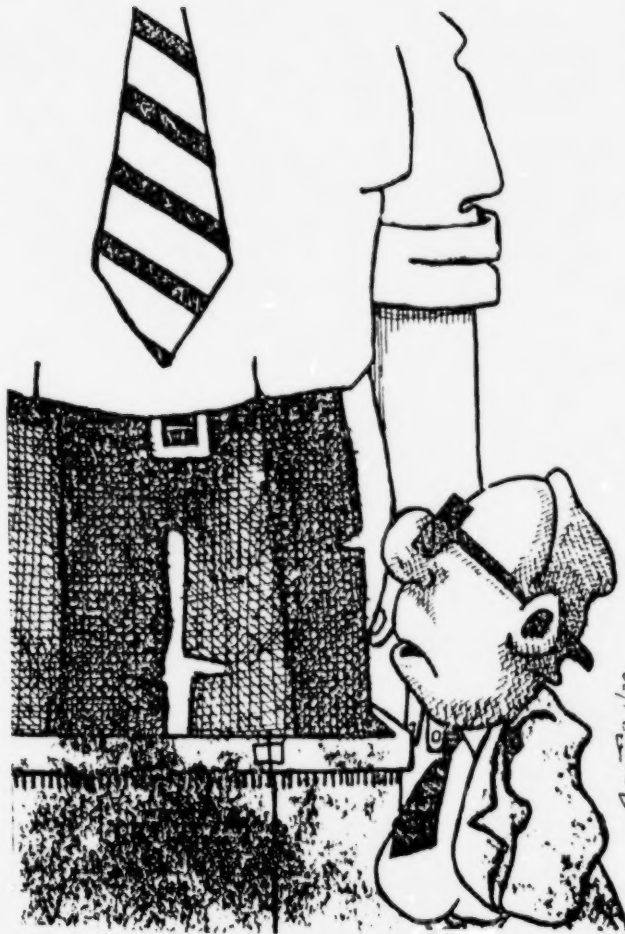
The incorporation cost for a cooperative is less than for a corporation.

Q. WHAT ARE THE DISADVANTAGES OF A COOPERATIVE?

The law governing cooperatives is somewhat complex.

Theoretically, a cooperative is not the most appropriate form of business organization, if the goal is profit maximization.

The above discussion of business organizations briefly outlines the more important elements of each. Which is best suited for your business will depend upon the individual facts of your operation. This chapter is not intended to provide you with an adequate knowledge of the relevant law so that you can make the final decision on your own. It is intended to enable you to be better prepared to discuss your fact situation with your advisor. It is suggested that you make the final decision only after consulting your lawyer, accountant, farm management specialise (MDA), or some similarly trained person.



THERE ARE ADVANTAGES AND DISADVANTAGES TO THE MANY FORMS OF
BUSINESS ORGANIZATIONS. CHECK EACH OUT BEFORE YOU DECIDE
WHAT'S BEST FOR YOU.

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LAND LAW

LAND AND WHAT IT INCLUDES

Q. WHAT IS INCLUDED IN THE DEFINITION OF LAND?

When we think of land, we think of all the earth, and all the physical things attached to it. It is clear then that land includes those things that are attached and growing from the earth. At one time it was said that the landowner owned the soil beneath his property to the centre of the earth, and the sky above to the heavens. This is not the case today. The landowner probably owns only so far as to fulfill his or her enjoyment of the land.

"Fixtures are also considered to be part of the land. A fixture is an object which is so attached to the land or to a building on the land, that it is considered to be part of the land. Therefore, if a building is erected on the land, and objects are permanently attached to the building, then the soil, the building, and the attached objects become the "land". The following are examples of fixtures:

- fences (unless portable)
- buildings on foundations
- permanently attached lights
- plumbing
- carpets
- natural products of the soil, such as grass and timbers and also the products of those plants and trees which, although needing attention when first planted, do not require it each year to produce a crop

The following would not be fixtures:

- tools
- portable buildings
- furniture
- machinery
- annual crops such as wheat, corn, or potatoes which require the periodical application of labour for their production

It must be noted that the parties involved in a sale can agree as to what is and what is not a fixture. In order to avoid dispute after dispute after the sale of the land, the parties should list what is included in the sale.

The government owns the rivers, streams, lakes, creeks, and other bodies of water within the province. The government, for the most part also owns the mineral rights in Manitoba. If the landowner does own the mineral rights, however, any sale agreement should clearly set out whether the mineral rights are also being sold.

Q. WHAT ARE THE FORMS OF OWNERSHIP OF LAND?

Land holding in Manitoba is based on a hierarchy of estates in land. All land in Canada is theoretically owned by the Crown (the government). The Crown has only regained direct control of some land, called Crown land - and the remainder is held by tenants. These tenants who are commonly known as landowners, can hold various estates or interests in land. These estates in land were originally granted by the Crown to certain people and have continued to be under private control. If the Crown wants the land back for any reason it can force its return through a process called "expropriation". The power of expropriation is subject to statutory requirements and the deprived owners must be compensated.

THE FEE SIMPLE

This is the largest estate in land known to law. The owner of a fee simple title has the largest interest in land it is possible to have. Ownership must be of an infinite length. The owner may sell the land to anyone he or she chooses. A fee simple estate may also be "willed" by the owner to anyone. Most of the land in Canada is held in fee simple.

THE LIFE ESTATE

A life estate is created when a fee simple owner grants to another the entire fee simple interest for a specified term. This specified term may be for the duration of the life of the person, or for the duration of someone else's life. So, unlike a fee simple, a life estate is not perpetual. A person called the "remainderman" will receive the estate after the death of the measuring life (this could be the original owner or another person).

A life estate could be created in the following situation. Mrs. Jones owns a farm and wants to leave this property to her children in her will, but she also wants to insure that her husband will be provided for during his lifetime. So in her will she would grant a life estate to her husband, with the remainder going to her children.

So after Mrs. Jones' death, her husband would have the complete use, enjoyment and benefit of the land during his lifetime. Upon the death of the husband the children would become holders of a fee simple. This form of land holding is seldom used today, but it does have a real significance in the area of dower.

Q. WHAT IS DOWER?

Dower was a device that was created by the early law to protect wives. On the death of her husband, the wife acquired a life estate in one-third of all of the husband's real estate. Today in Manitoba the law in this regard is governed by The Dower Act.

Q. WHAT RIGHTS DOES THE DOWER ACT GIVE TO A SPOUSE?

Before answering this question, we must define "homestead". If situated in a city or town, a homestead is a dwelling house occupied by the owner and his/her spouse as their home, and this includes the surrounding land on which the house is situated. If situated outside of a city or town, a homestead is a dwelling house occupied by the owner and his/her spouse as their home and not more than three hundred and twenty acres.

The Dower Act gives both the husband and wife a power of veto over the disposition of the homestead. In other words before the owner of the homestead can sell it, he/she must obtain the consent of his/her spouse. The Act also provides that where the spouse who owns the homestead dies, the surviving spouse has a life estate in the homestead, regardless of what any will of the deceased spouse says. Therefore the surviving spouse has the right to live in the homestead for the rest of his or her life. The Act also provides that a surviving spouse must receive one-half of the estate of the deceased spouse, in addition to the life interest in the homestead, unless the deceased spouse has made a will providing that the surviving spouse receives a minimum of: 1) a lump sum of \$250,000, or 2) a lump sum of \$150,000 plus an annual income of \$10,000 or 3) an annual income of \$15,000. It must be noted that the protection afforded by this Act may be lost if the surviving spouse has left the deceased spouse with the intention of living separate and apart.

Leasehold Estate

In a leasehold situation the owner of the land is known as the lessor and the person who rents the land is known as the lessee. The lessee has the right to use the land for a definite period of time, but eventually the use of the land will go back to the holder of the fee simple. Leasing will be discussed in greater detail under the heading of The Leasing of Land.

CO-OWNERSHIP

Q. HOW IS CO-OWNERSHIP DEALT WITH IN OUR SYSTEM?

The ownership of an estate in land may be by way of a fee simple, a life estate, or a leasehold estate. The ownership of these estates can be by one or several people. Where more than one person is the owner of land, they hold the land either as joint tenants or as tenants in common. (A corporation can own land in the same manner as an individual.)

Joint Tenants

The dominant feature of a joint tenancy is the right of survivorship. This means that in the event that one of the owners dies, ownership of the property automatically goes to the surviving owners. So in a situation where A and B own land as joint tenants and A dies, A's interest in the land automatically goes to B and not to A's heirs. Because of this result, joint tenancies are generally limited to situation where the property is owned by closely related people such as husbands and wives. A joint tenancy would not, in many instances, be an appropriate arrangement for business partners. It must be noted that this form of ownership can provide an effective means of estate planning.

There are a number of requirements which must be satisfied for a joint tenancy to exist, including:

- 1) The co-owners must have the same interest in the land. For example, all would have to hold a fee simple.
- 2) Each of the co-owners is as much entitled to the possession of the land as the others. None can have an exclusive right to any particular part of the land.

If the joint tenants do not continue to meet these requirements, there will be a severance of the tenancy, and the arrangement will be converted to a tenancy in common. A severance can result either from an agreement between the tenants, or if one of the tenants does something which is inconsistent with a joint tenancy. For example, assume A and B are joint tenants. If A sells a life interest in the property to C, the joint tenancy is severed because A and B no longer have the same interest in the land. No agreement is required. A and B would from that time hold the property as tenants in common.

Tenants in Common

If two people hold land as co-owners, but not as joint tenants, they are called tenants in common. Each owner has a distinct share in the property which has not yet been divided among the co-owners. With a tenancy in common there is no right of survivorship. That is, if one of the owners dies, the property does not automatically go to the other owner. To whom the property goes will be determined either by the deceased owner's will or if he/she has no will, by the Devolution of Estates Act (discussed in the chapter on wills).

The Law of Property Act provides that where land is conveyed between living persons or in accordance with a will, the owners hold as tenants in common, unless the opposite intention is clearly expressed.

So if Mr. and Mrs. Jones purchase land, and they want to hold the land as joint tenants, they must specify that the seller transfer the land to them as "Joint tenants and not as tenants in common".

Partition

Q. WHAT CAN BE DONE IF CO-OWNERS DECIDE THAT THEY DO NOT WANT TO BE CO-OWNERS, BUT THEY CAN'T AGREE ON HOW TO DIVIDE THE PROPERTY?

If either joint tenants or tenants in common decide that they no longer want to be co-owners and the co-owners can't agree as to how the property should be divided, they may then apply to the court for an order of partition. If granted, an order of partition will convert the former co-owners into sole owners of a piece of the property. The court when granting an order of partition attempts to insure that each party receives a share of the property which is proportionate to his/her former interest in the co-owned property. In many cases, in order to achieve this division, the land will be sold and the proceeds divided between the co-owners.

LAND TITLES

In Manitoba there are two systems of recording interests in land: 1) the Registration of Assurances (known as the Old System); and 2) the Torrens System. Which of the two systems that will operate in any given case depends on the history of the particular piece of land. These systems are mutually exclusive, so it is not possible for a piece of land to be registered under both systems.

The Old System

This system was established in 1870 when the Hudson Bay Company sold a vast tract of land, part of which was Manitoba, to the Canadian Government. Everyone who held title prior to 1870 had their title reconfirmed by the Government. Under the old system, which is technically a registration of assurances (usually deeds) system, all titles must be traceable back either to 1870 or to a Crown Grant made after 1870, but before the implementation of the Torrens System. Therefore, a purchaser is obliged to check each transaction back to 1870 or the Crown Grant, because if any transaction is bad the entire chain is broken and the purchaser loses his title to the land. Obviously this system can be expensive and worrisome for the potential purchaser. Given these complications, the need for the expertise of a lawyer is essential in any transaction dealing with the Old System.

The Torrens System

Most of the property in Manitoba is held under the Torrens System of land registration. The Torrens System applies to all crown grants made after February 20, 1914. Most of the land still held under the Old System is gradually being transferred to the Torrens System. No subdivision of land may operate under the Old System and no land purchased at a tax sale may retain its registration under the Old System. It should also be noted that a person can apply to have land changed from the Old System of recording to the Torrens System.

The Torrens System is based on three major principles. The first is the compulsory registration of all conveyances and transactions in land (i.e. sales, mortgages, etc.). Every dealing in land, in order to be recognized, must be shown on the title.

The second principle is what is termed the indefeasibility of the registered title. This means that no interest in the land which is not shown on the title can be made against the title. But the Real Property Act allows certain rights, such as rights of ways, municipal tax claims, leases, etc., to be enforceable against the title even if they do not show up on the title. If someone has obtained the title by fraud, the rightful owner will be able to successfully advance his claim against the title.

The final principle provides compensation for anyone whose interests are wrongfully but irretrievably lost by the issuing of a new title. The compensation comes from a fund set up for people, who in spite of the rigorous system of safeguards against such mishaps, are wrongly deprived of their rights in the land.

These three principles are designed to provide a land titles system which is safe and relatively easy to use. If land is being transferred, a purchaser or his lawyer can go to the Land Titles Office and do a title search. Providing that the land is registered under the Torrens System, the purchaser will be able to examine a Certificate of Title, which contains information on which he can completely rely. No further checking will be required, as is the case in the Old System. This makes land conveyancing easier, faster, and less expensive.

BUYING AND SELLING LAND

Q. WHAT ARE THE PRELIMINARY PROCEDURES INVOLVED IN THE BUYING AND SELLING OF LAND?

After you have decided to sell your property, calculated its value, and decided upon the terms of the sale, you must decide how to find a buyer. You may attempt to do this yourself, or through a real estate agency.

If you decide to sell your property through a real estate agency, you will have to complete and sign a "Listing Agreement". This agreement will contain the following information: 1) the length of the listing period; 2) description of the property to be sold; 3) terms of the sale and desired price; 4) agents commission; and 5) date the property is available for possession.

It must be noted that a listing agreement is a legally binding document. So if the real estate agent brings to you a buyer with a signed offer to purchase the property, and you refuse to accept this offer because you have changed your mind about selling the property, you will still be obligated to pay this agent his/her commission, just as if the sale had taken place.

If the real estate agent finds someone who is interested in buying the property, the potential purchaser will complete and sign an "Offer to Purchase". This offer to purchase may be on the same or different terms as contained in the listing agreement. The potential purchaser, to show that he is serious, will give the agent a deposit (this deposit will be returned if the seller (vendor) does not accept the offer).

The agent then takes this offer to purchase to the seller for his/her consideration. If the seller agrees to the terms, he/she will sign the offer. When the seller signs the offer there is an acceptance of the offer and a legally binding agreement is created. If the seller does not agree to the terms of the offer, he may make a counter offer to the potential purchaser. The potential buyer could then accept or reject this offer, or make another counter offer. A purchaser or seller would be well advised to consult his lawyer before the offer is signed, so as to check on the ramifications of any terms included in the offer.

A potential purchaser could make his offer to purchase conditional on his/her being able to obtain the necessary financing. This type of term would allow the purchaser to get out of the deal if the required financing can't be obtained.

In regards to the seller, if the property in question is a homestead, his/her spouse must give written permission for the property to be sold, in accordance with the Dower Act.

It must also be remembered that any agreements concerning the sale of land must be in writing in order to comply with the Statute of Frauds. If the agreement is not in writing it will not be enforceable, unless it can be saved by the "doctrine of part performance". Under the doctrine of part performance a court will uphold an unwritten agreement if the contract has been partly carried into effect by one of the parties. Neither party would be wise to rely solely on this doctrine, but instead should insure that any agreement is in writing.

Q. WHAT HAPPENS IF AFTER THE OFFER TO PURCHASE HAS BEEN ACCEPTED ONE OF THE PARTIES ATTEMPTS TO GET OUT OF THE BINDING AGREEMENT?

If the purchaser decides not to go through with the purchase, he/she will forfeit his/her deposit. The seller may also sue the purchaser for damages and/or specific performance (see Contracts chapter).

If the seller decides not to go through with the deal the purchaser can sue for damages and/or specific performance.

Q. WHAT ARE SOME POSSIBLE METHODS OF FINANCING THE PURCHASE OF LAND?

Cash deal

The transaction could be a straight forward cash deal, that is, the buyer would pay for the land. If the buyer is unable to pay the full purchase price in cash, he may be able to assume (take over) the seller's remaining mortgage and pay the remaining balance in cash.

Mortgage

The buyer could finance the purchase of the land with a mortgage. A mortgage is a loan with land as security. Depending on the lending institution, the buyer may have to put up between five and twenty-five per cent of the purchase price as a down payment.

If the buyer defaults in the repayment of the mortgage loan the lender can have the land sold to repay the debt, through a process known as foreclosure. Most mortgages will be registered on the Certificate of Title.

The borrower should also check to see if the mortgage allows the right to pre-pay all or part of the loan. Most mortgage lenders allow pre-payment of the mortgage provided they receive a three months interest penalty. If the mortgage is for longer than five years and five years have passed since the mortgage was obtained, the lender must accept pre-payment, if the borrower also pays for three months interest. It should be noted that the interest rate charged by the lender may be slightly higher for this pre-payment privilege.

Agreement for Sale

With an Agreement for Sale the seller of the land enters into an agreement with the purchaser whereby the purchaser agrees to pay through installments over time the full purchase price of the land. The seller of the land retains the title to the land until he has received the full purchase price. The purchaser is granted possession of the land as if he/she were the actual owner, so long as he/she continues to pay the installments under the agreement. If the buyer is unable to make the required payments, the purchaser will enter into proceedings whereby he/she regains possession of the property.

The purchaser of the land under an Agreement for Sale would protect his/her interest in the land by filing a caveat in the Land Titles Office. A caveat provides notice that because of some type of written document or circumstances, there exists an outside interest in that property (a caveat can be filed for many reasons, e.g., for lease agreements, options to purchase, etc.).

THE LAND CONVEYANCING PROCESS

Q. HOW IS LAND OWNERSHIP TRANSFERRED FROM THE SELLER TO THE BUYER?

Land conveyancing is the process whereby the title to property is transferred from one person to another. The following discussion will only look at the Torrens System.

Assuming that we have a binding sales agreement and acceptable financial arrangements have been made, the title to the property must be transferred to the purchaser. This procedure should be done by a lawyer to insure that no important considerations are overlooked. The purchaser's lawyer will insure that the title is transferred free of encumbrances and as required by the purchaser. The seller's lawyer will insure that the seller's title to the land is protected until the full purchase proceeds are received.

The purchaser's lawyer will do a "search of the title" of the property in question. This means that he/she will check to see if there are any caveats, liens, and encumbrances registered against the title. He will ensure that the seller's spouse has given his/her consent to the sale. The purchaser's lawyer will also advise the purchaser as to how best to take title (e.g., joint tenancy, or tenancy in common) and advise the seller's

lawyer of this. If the purchaser's lawyer is satisfied that all is in order he/she will send the purchase funds to the seller's lawyer on the condition that the title be transferred to his/her clients free and clear of all encumbrances (with the possible exception of a mortgage or whatever else agreed upon) and that his/her client will be able to take possession on the agreed date. The seller's lawyer will insure that the seller's title to the land is protected until the full purchase proceeds are received. If all is in order the seller's lawyer will prepare a transfer of title to be signed by the seller. When this is done, the transfer is forwarded to the Land Titles Office.

If there are no encumbrances against the Certificate of Title, the Land Titles Office will issue a new Certificate of Title registered in the name of the new owner(s). If there is a mortgage involved, it will be recorded on the back of the Certificate of Title, and the Certificate will be retained by the Land Titles Office until the mortgage is removed. If there is no mortgage, the new Certificate of Title will be forwarded to the new owner(s).

It must be noted that the explanation of the transfer process has been greatly simplified here. The purchaser's and seller's lawyers will both follow an involved procedure to protect his/her client's interest in the transaction. You would be well advised to consult your lawyer during all stages of the purchase or sale of property. This should prevent expensive future problems.

Q. WHAT ARE EASEMENTS?

An easement is a right enjoyed by someone over the lands of another. Public utilities such as hydro, and telephone companies often have easements over land. These rights will be registered on the title, and become a permanent charge against the land. The owner generally can't remove easements from his/her land. A potential purchaser should inquire into any easements on the prospective property, and as to how they will hinder the use of the land.

RESTRICTION ON FOREIGN OWNERSHIP

In Manitoba The Agricultural Lands Protection Act provides, with some exceptions, that a person who is not a resident of Canada (including a foreign controlled corporation) may not own or have an interest in land that exceeds the aggregate of twenty acres. Proposed legislation will place even greater restrictions on who can own land in Manitoba. Anyone who violates the Act or helps and advises another person to violate the Act may be fined an amount up to \$50,000. So before selling land to a person or corporation who is a non-resident, you would be well advised to inquire as to whether this person or corporation is legally entitled to buy land in the province.

This inquiry is also required under the Income Tax Act when purchasing land from a non-resident, as a percentage of the purchase price may be payable to the federal government. If this is not done, the purchaser may become personally liable for the amount owed to the federal government.

LAND EXPROPRIATION AND COMPENSATION

Q. WHAT IS EXPROPRIATION AND WHO MAY DO IT?

Expropriation is the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers. The federal government and all of the provinces have statutes which permit expropriation, that is, the acquisition of title to land without the consent of the owner. This chapter will only examine expropriation by the province of Manitoba, and not the federal government (Province includes city, town and municipal bodies).

Q. WHAT PROCEDURE IS REQUIRED FOR THE EXPROPRIATION OF LAND?

Pre-expropriation procedure

Before the power to expropriate can be exercised, the body wanting to expropriate must make a declaration of expropriation. This declaration of expropriation must be confirmed by a confirming authority. This con-

firming authority could be one of the following: in the case of a school division, the board of trustees or; the Lieutenant Governor in Council (the provincial cabinet). The notice of the intended expropriation is forwarded to the Land Titles Office. The Land Titles Office records this on the Certificate of Title which are to be affected. A notice of the intended expropriation is served upon all of the owners of the affected land, and is published in a local newspaper.

If an aggrieved person can show that the confirming authority has not complied with The Expropriation Act, he has six weeks to apply to a court to have the declaration of expropriation quashed. The owner of any interest in the land who objects to the intended expropriation may file, within thirty days from the notice of the intended expropriation, a Notice of Objection. This Notice of Objection would include the nature of his/her objection and the grounds upon which it is based.

If a Notice of Objection is filed an inquiry officer will be appointed. The inquiry officer will then fix a suitable time and place for a public hearing. At the public hearing the inquiry officer will inquire into whether the intended expropriation is fair and reasonably necessary for the achievement of the objectives of the expropriation authority.

After the inquiry officer has made a report the confirming authority will consider it. The confirming authority will then make its order in respect of the declaration of expropriation. If this order is not the same as the inquiry officer's, a reason must be given for the order.

When the declaration and the order confirming the declaration of expropriation are registered in the Land Titles Office, the ownership of the land vests in the expropriation authority. This part of the procedure is not subject to appeal, so long as the Act has been complied with. So any inquiry or recommendation made by an inquiry officer because of a Notice of Objection is not binding upon the expropriation authority. The decision not to expropriate will be a political decision.

It must be noted that the expropriating authority has the right to enter on to lands, without the consent of the owner, to survey and examine the land, and for the purpose of making an appraisal of the value of the land.

At the end of the pre-expropriation procedure the land is owned by the expropriating authority. All that remains is the determining of, and the paying of the compensation.

Post-expropriation procedure

Within one hundred and twenty days after the registration of the declaration and before serving a notice for possession of the land, the expropriating authority must serve upon each registered owner of the land a written notice stating the amount that is offered in compensation for the market value of the owner's estate (possession of the land can occur thirty days after notice is given).

If the parties have failed to reach an agreement as to the amount of compensation that should be paid, the Land Value Appraisal Commission will hold a public hearing. All parties may be represented here by a lawyer and can call witnesses and submit evidence. It then becomes the duty of the commission to determine and certify an amount which represents due compensation under the Act. Due compensation includes the market value of the land, disturbance costs, damages for injurious affection, special economic advantage, special value of a residence, etc.

If the parties still can't agree, compensation will be determined by the Court of Queen's Bench. Expert witnesses can be called at the proceeding. Either party can require the judge to specify the amount awarded in respect of any particular matter included in the compensation. A further appeal lies to the Court of Appeal.

THE LEASING OF LAND

A lease (sometimes called a demise) is a conveyance or grant of the possession of property made by the owner of that property to another for a determined period of time, in exchange for a consideration called rent. The person who grants the lease is called the lessor, and the person to whom it is granted the lessee.

Q. WHAT ARE THE REQUIREMENTS OF A LEASE?

Common sense dictates that all leases should be in writing. This will avoid any dispute as to the terms of the agreement and the obligations of each party. The Statute of Frauds provides that leases in excess of three years must be in writing and signed by the parties to the lease.

Where applicable the Dower Act must be complied with. The Act provides that no "disposition of a homestead can be made during a spouse's lifetime unless the spouse gives consent in writing". The Act defines disposition to include a lease for more than three years, but does not include a lease made for a period not exceeding three years. The lessees would be wise to insure that the requirements of the Act have been complied with.

The Real Property Act provides that if a lease is for less than three years and there is actual occupation thereunder it is not necessary to register it or file a caveat in order to protect the rights of the lessee, but if the lease is for a period in excess of three years, the owner may execute a prescribed lease form which may be registered. A certificate of title for a leasehold estate will then be issued to the lessee.

The Act also states that a lease contains the following implied agreements: 1) that the lessee will pay the required rent at the required time; and 2) that the lessee will keep the leased property in good repair (the lease could alter these implied agreements). It must be noted that the law in regard to repairs does not apply to residential tenancies.

The Act also states that a lease gives the lessor the following implied powers: 1) to enter upon the leased land and check its state of repair, and if necessary, leave a written notice with the lessee requiring that the leased property be repaired; and 2) to take possession of the leased land if the rent or any other agreement has been in default for more than two months (the lease could alter these implied agreements).

The Act also states that no lease of mortgaged or encumbered land is valid and binding against a mortgagee or encumberancer, unless he has consented to the lease prior to its registration.

The drafting of a lease is also important. All of the terms of the agreement should be set out in the lease. It would be advisable to consult your lawyer in this regard. In regards to possible lease arrangements your Agricultural Representative or Farm Management Specialist can be of great assistance to you. Manitoba Agriculture has prepared a booklet entitled Land Leasing Agreements which will be of aid to you. It contains sample lease agreements for the various methods of leasing.

Q. WHAT ARE THE BASIC TERMS THAT SHOULD BE INCLUDED IN A LEASE?

The following basic terms should be included in a lease:

- 1) the parties to the lease;
- 2) the legal description of the land that is being leased;
- 3) the duration of the lease;
- 4) the amount of the rent and when due;
- 5) how the land is to be used and any restrictions on use;
- 6) option to renew the lease;
- 7) option to purchase the leased land;
- 8) any requirement as to farming practices;
- 9) the right of the lessee to sublet;
- 10) responsibility for loss or injury caused by the lessee;
- 11) rights if one of the parties breaches the lease;
- 12) what happens on the death of one of the parties.

Depending on the complexity of the individual circumstances, additional terms may be required.

Q. WHAT ARE THE DIFFERENT KINDS OF LEASING ARRANGEMENTS FOR FARM PROPERTY?

Crop Share Lease

This is probably the most common of all land leasing agreements. The lessors (landowners) rent is calculated by dividing the produce of the land according to a pre-determined split. Quite often the produce is divided such that the lessor gets one-third and the lessee gets two thirds.

With this type of lease the lessor generally supplies the land and building and the lessee provides the labour, machinery, and operating expenses. It has been suggested that to promote efficient use of the leased land, other costs such as seed, fertilizers, and chemicals should be divided between the lessor and lessee in the same proportion as the crop or income is divided.

The following are some of the more important advantages of this type of lease: 1) the lessor and lessee share the risk and uncertainty of the market and weather; 2) the rental payments vary directly with production; and 3) the lessor may share some of the production costs.

The following are some of the more important disadvantages: 1) the lessor must rely on the lessee's honesty; 2) the lessor, to the annoyance of the lessee, may want to be involved in the management decisions; 3) gains due to the lessee's superior farming ability must be shared with the lessor; and 4) the lessor has no way of knowing in advance what his return will be.

The cash lease

With this type of lease, the lessee pays a fixed amount to the lessor for the use of the property (this is quite often calculated on a per acre basis). With this type of arrangement the lessee receives all of the income and generally pays all expenses other than taxes and building insurance. The lessor should insist on collecting part of the rent before the lessee starts farming the land, to insure that the rent will be paid.

The following are some of the more important advantages of this type of lease: 1) the lessor knows in advance what his return will be and is not subject to any of the risks and uncertainties of the market or weather; 2) a lot of the potential areas of disagreements are eliminated; 3) the lessee receives all the gains due to his superior farming ability; and 4) this type of lease is a lot simpler to administer.

The following are some of the more important disadvantages: 1) the lessee must pay the fixed rent even if low prices and poor yields occur; 2) it may be difficult to determine what is a fair rent; and 3) the parties may want to limit the lease agreement to a short period of time for fear of fluctuations in produce prices and costs, and therefore neither party can establish a long term plan.

The flexible cash lease

This type of lease attempts to combine the advantages of the cash lease and the crop share lease. The lessor will get a rent payment of cash, but the amount will depend upon crop yield or crop price. The lease

could provide that a minimum amount of rent is payable.

By having the rent fluctuate in accordance with price changes, the farming risk is distributed between the lessor and lessee.

The following are some of the more important advantages of this type of lease: 1) a well thought out flexible lease may facilitate longer term leasing agreements; 2) the lessor and lessee share in some of the risk and uncertainty in prices and yields; and 3) the lessor shares in the gain of good years.

The following are some of the more important disadvantages: 1) the formula for calculating rent is complex; and 2) the lessor doesn't know in advance what he will receive in rent.

Manitoba Agriculture has produced a booklet entitled Land Leasing Agreements which contains examples of each lease agreement. The booklet also gives examples of how the profit sharing calculations are made for each lease agreement.



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FARM MACHINERY and PERSONAL PROPERTY LAW

This chapter is intended to inform farmers of their rights in regard to dealings in farm machinery and equipment. Some legislation such as The Farm Machinery and Equipment Act, has a specific application to this area. Other legislation, such as The Consumer Protection Act, The Personal Property Security Act, and The Sale of Goods Act, while not specifically dealing with farm machinery and equipment may affect transactions in them. These latter three acts will be briefly examined in regard to how they affect transactions in farm machinery, as well as other personal property. For more specific information on these acts and how they apply to your situation, you should consult your lawyer.

THE FARM MACHINERY AND EQUIPMENT ACT

The primary purpose of the act is to protect the interests of farmers in their dealings with farm machinery and equipment suppliers.

Q. TO WHAT TYPES OF TRANSACTIONS DOES THE ACT APPLY?

The act applies to the sale of all new farm machinery and equipment in Manitoba. The act does not apply to the sale of used farm equipment by a dealer, except in the case of repossession and sale, and assignment of earnings. The act also doesn't apply to sales of farm equipment by farmers by auction or in the ordinary course of their farming business, nor to the sale of farm machinery by an executor or administrator of an estate, or by a public official acting under judicial process.

The act defines farm machinery and equipment to mean any farm machine or equipment that has a retail selling price of \$1000 or more and is used or intended for use in any type of farming operation. Passenger automobiles, farm trucks, jeeps, snowmobiles, and all-terrain vehicles are not included in this definition.



Q. WHAT DOES THE ACT PROVIDE IN REGARD TO REPAIR PARTS AND EMERGENCY SERVICE?

The act says that a dealer, manufacturer or supplier of farm equipment shall insure that repair parts for any equipment that he or she sells shall be available for a period of ten years from the date of purchase.

The act further says that within this ten year period those repair parts shall be made available to a farmer within fourteen days from the date of the order, (Saturdays, Sundays, and holidays excluded), unless delivery of the parts cannot be made within that time because of strikes or other conditions beyond the control of the dealer or supplier.

The act also says that every purchase contract for the following machinery shall have a provision to allow the purchaser to order emergency repair parts from the dealer at any time between the hours of eight a.m. and ten p.m. of any day except Sunday during the season of use. The equipment included in this provision is that used in:

- haying
- seeding
- harvesting
- milking
- feed-processing
- mechanical feeding
- farm tractor when used in seeding, haying, harvesting or tilling operations.

The procedure for ordering these emergency repair parts is to be set out in the contract of purchase.

If the farm equipment breaks down during the season of use and it cannot be used to perform its intended functions, the purchaser must notify the dealer when ordering repair parts that they are required for emergency repairs. The dealer must then insure that they are available at his or her place of business within 72 hours of the farmer making the order, (again not including Saturdays, Sun-

days or holidays) unless the delivery of the parts can't be made within that time because of strikes or other conditions beyond the dealer's control.

The dealer is not allowed to charge more than the price set out in the retail price list for the repair part, but a service charge of not over ten dollars may be charged for each order of emergency repair parts.

Where the dealer is not able to obtain the emergency parts within the allotted time, the dealer must pay to the purchaser one-half of the normal rental rate applicable for that piece of equipment. This applies from the date of the expiry of the time limit to the date on which the repair part is made available to the purchaser. (This applies only for the time period during which the farm equipment would normally be used.) Instead of making this payment, the dealer could supply the farmer with other equipment suitable for doing the job of the broken machinery at one-half of the normal rental rate for that piece of equipment. The "normal rental rate" for farm equipment will be established by The Farm Machinery Board. It must be noted that the provisions in this paragraph only apply if the purchaser is dealing with the dealer from whom the farm equipment was purchased.

Q. WHAT CAN I DO IF THE DEALER FROM WHOM I HAVE PURCHASED MY EQUIPMENT FAILS TO DELIVER IT ON THE DATE SPECIFIED?

The act says that a purchase contract shall specify the date of delivery. If the dealer cannot meet this delivery date he or she must notify the purchaser of this five days before the date. The purchaser then has the option of cancelling the contract.

If the purchaser cancels the contract, the dealer must return to the purchaser all of the money and other consideration he or she was given by the purchaser. The dealer must also return any goods given in trade in the same condition in which they were given. If the trade-in has been sold, the dealer must pay the purchaser its market value as specified in the contract of purchase. If the dealer has repaired the trade-in, he or she is entitled to be paid for the reasonable cost of the repair, including labour.

If the purchaser, after being notified of the late delivery, chooses to accept it, the dealer must

1) provide the purchaser with alternative equipment with approximately the same capability to carry out the function of that ordered by him or her, or

2) pay the purchaser the normal rental rate for similar machinery for the time that the machinery would have been used between the promised date and the actual date of delivery.

The dealer may cancel the contract of purchase if he or she cannot complete the delivery of equipment, only if notice is given to the purchaser fifteen days before the specified date of delivery. The dealer would then have to return all money and other consideration he or she had been given for that equipment by the purchaser.

Q. DOES THE PURCHASER OF NEW FARM MACHINERY HAVE A TRIAL PERIOD?

The act states that every contract for the purchase of new farm machinery shall state clearly, the intended functional requirements of that machinery. The contract shall also clearly state that there is a trial period which shall commence on the first day of actual use, for a minimum of ten days during the first season of use after purchase.

If, during the ten day trial period, (or as specified in the contract) the farm machinery fails to perform its intended purpose, the purchaser may reject the machinery. He or she must then notify the dealer in writing of this fact and personally deliver the notice to the dealer at his or her ordinary place of business, or by prepaid registered mail addressed to the dealer. The dealer then has seven days after notification to correct the failure.

If the dealer, in this seven day period, has been unable to correct the equipment, the purchaser may reject the equipment and cancel the contract. Notice of cancellation must be in writing and sent to the dealer by registered mail within three days after the seven day period. The dealer must then return all money and other consideration he or she received from that purchaser.

If the failure of the machinery is due to the negligence of the purchaser, the above provisions do not apply.

Q. DOES THE ACT PROVIDE FOR A WARRANTY ON NEW FARM MACHINERY, AND IF SO, FOR HOW LONG?

The Act says that all new farm machinery

sold by a dealer shall carry a warranty against defects in material and workmanship. For tractors, this warranty is for a minimum of two years from the date of delivery, or 1,500 hours of use, whichever occurs first. For combines, the warranty is for at least two years from the date of delivery, or 300 hours of use. For all other farm machinery the warranty is for at least one year from the date of delivery.

The warranty includes the cost of defective parts, labour and transportation up to a maximum distance of 50 miles from the dealer's place of business. The warranty would not cover transportation if the equipment is capable of being driven.

The following parts, while not subject to the warranties set out in the act, are subject to the warranties supplied by the manufacturers: tires, batteries, belts, radios, air conditioners, tape decks, cigarette lighters, two-way radios and ventilating fans.

Diesel pumps, hydraulic components, starters, alternators, regulators and other electrical parts except those listed in the next paragraph are warranted from the date of purchase for two years or 1,500, whichever comes first, when installed on tractors. When these parts are installed on combines they are warranted for two years or 300 hours whichever comes first. When they are installed on other machines, they are warranted for one year.

The following parts are excluded from the warranty provisions of the act: ignition parts, lubricants and oils, chemical liquids, spark plugs, fuses, light bulbs and filters.

It must be noted that the warranty provided by the act is limited to the original purchaser of farm machinery, and does not apply to machinery purchased by a custom operator.

New parts used to replace defective parts are warranted against defects in material and workmanship for a minimum of one year from the date of replacement or for the balance of the warranty period, if there is more than one year left on the original warranty period. Repair parts purchased from a dealer are warranted against defects for one year from the date of purchase.

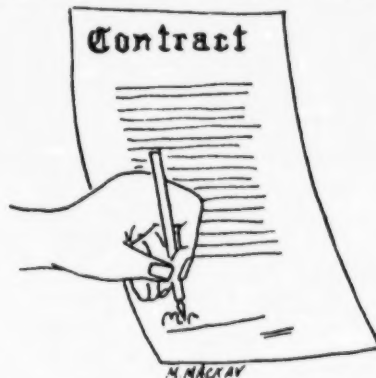
Again, it must be noted that the warranties set out in the act do not apply where the deterioration of parts is due either to normal wear and tear, or the negligence of the purchaser or operator.

The act also says that a dealer may not make an agreement to limit his or her liability as set out in the

act. Any such attempt at an agreement is void.

Q. WHAT IF THE PURCHASER IS UNABLE TO READ THE LANGUAGE
IN WHICH THE CONTRACT IS WRITTEN?

The act says that if a purchaser cannot read the language in which the contract is written, the contract must be read over and explained to the purchaser in his or her own language before he or she signs the contract.



Q. WHEN DOES THE CONTRACT BECOME BINDING ON THE PURCHASER?

The act says that a contract signed by a purchaser does not become binding upon him or her until it is signed by the dealer (or his or her agent), and is then delivered to the purchaser or is deposited in his or her post office. This does not apply where the purchase price has been paid in full and the purchaser has taken delivery of the equipment.

Q. HOW DOES THE DEALER, BANK, FINANCE COMPANY, OR OTHER
PERSON FINANCING THE PURCHASE OF FARM EQUIPMENT INSURE
THAT THE UNPAID PURCHASE MONEY WILL BE PAID?

The person financing the purchase of farm machinery can protect his or her interest in the unpaid money by placing a lien on the equipment for the unpaid balance. This person is called a lien holder. A lien is a security for a debt or other obligation and is used to secure the payment of a debt or the performance of an obligation. The act provides that a lien holder can only have a lien on the equipment if the lien is specified in a lien note. The lien note must form part of the contract document.

Title to farm machinery that is sold subject to a lien remains in the lien holder until the full payment of the purchase price is made. The purchaser is entitled to possession and use of the equipment, even though he or she does not get full title until payment is completed.

Even though the dealer retains title, the equipment is at the risk of the purchaser as to damage and deterioration.

Q. WHAT CAN THE LIEN HOLDER DO IF THE PURCHASER DEFAULTS ON HIS OR HER PAYMENTS?

The act says that where a purchaser is in default of payment or abandons the farm machinery, and the lien holder wishes to repossess the machinery, he or she must apply to the Farm Machinery Board for permission to repossess. A copy of the application must be sent to the purchaser. The board will then consider all of the relevant factors. The purchaser may supply the board with reasons why he or she objects to the repossession.

If the lien holder is allowed to repossess, he or she must keep the machinery for at least ten days, not including Saturdays, Sundays or holidays, so that the purchaser may redeem it on the payment of money in default, interest due, and expenses of repossession.

Where the lien holder sells the repossessed farm machinery he or she is entitled to keep:

- 1) the amount owed by the purchaser, including interest if any,
- 2) the costs of repossession and sale not over 10% of the sale price, and
- 3) the cost of repairs to the machinery that may have been necessary to make the sale.

The lien holder must turn over any surplus remaining to the purchaser.

The act says that where a lien holder repossesses then sells the machinery for less than the amount owed by the purchaser, the debt of the purchaser is nevertheless fully discharged. No further action is available to the lien holder against the purchaser to recover the rest of the purchase price.

Q. THE ACT GIVES THE PURCHASER OF FARM EQUIPMENT A LARGE NUMBER OF RIGHTS. IS THERE ANY REQUIREMENT THAT THE PURCHASER BE INFORMED OF THESE RIGHTS?

The act says that where you buy any new farm equipment from a dealer, the dealer shall give you a brochure

before or at the time of delivery, which sets out a number of details. Those details are:

- the details of the warranty as required by the act,
- the name, address and telephone number of the dealer, supplier or manufacturer who is responsible under the warranty,
- the name, address and telephone number of the dealer from whom repair parts may be ordered,
- the procedure to be followed and the name, address and telephone number of the dealer responsible for supplying emergency repair parts and services,
- the period of the year when emergency repair parts and services will be available,
- any alternate sources where emergency repair parts and services will be available,
- the terms on which repair parts will be available, and the time within which they will be made available under normal as well as emergency situations,
- the procedure involved in repossession as set out in the act.

As you can see, you have a wide range of rights under the act which you are obliged to be made aware of. Use these rights and the act to your benefit whenever you can!

PERSONAL PROPERTY LAW

The law of property has been divided into two categories; real property and personal property. Real property deals with land law or real estate. Personal property deals with all other forms of property, called personalty. Personalty is also called "chattel". Chattel is a very broad term which refers to all moveable property.

Q. WHAT IS THE DIFFERENCE BETWEEN POSSESSION AND OWNERSHIP OF PROPERTY?

Possession

The meaning of possession will vary according to the area of law with which you are dealing. What property law considers to be possession of chattels is different from what criminal law considers to be possession of stolen goods. Possession in property law uses a threefold classification scheme. There is de facto possession, legal possession, and right to possess.

1) De facto possession or custody refers to the simple fact that a person has control of a chattel so as to prevent others from interfering with it. This type of possession is not given specific legal protection. You merely have a physical hold over the goods, independent of any legal right. Someone may have "custody" of goods that he or she steals.

2) Legal possession is specifically recognized and protected by the law. It requires the physical control of the goods and the intention to control them for your own purpose. This intention is determined by looking at the way you are treating the chattel.

3) The law will protect persons lacking legal possession when they are either owners or persons whose legal possession was unlawfully interfered with. For example, if your car is stolen, you lose de facto possession of it, but in law you still have the right to possess it, and the law will protect this right. You will be able to sue to recover this property. The right to possess may be in more than one person at any one time. For example, if you rent a car for a day, the rent-a-car company keeps the right to possess the car. But, you, too, have the right to possess it and may sue a third party who steals it.

Protection of possession is a prime objective of the law. The law presumes that a person in possession of

goods has title to them, and the law will protect such possession against all who cannot prove they have better title to the goods.

Ownership

Ownership is often called "title". The "owner" of goods is the person who, in law, has the best title to them. "Title" is a relative concept, though. The law recognizes a kind of "pecking order" among claims to ownership. The person with the best title, in comparison to other titles, is granted legal protection of that title.

Ownership can be described as a bundle of rights. Two of the most important rights of ownership are the right to control and dispose of (sell, mortgage) the property, and the right to possession of the property.

Ownership of tangible goods can be either absolute or qualified. It is absolute where the possession is sole and exclusive and can't be lost without some act or default by the possessor. For example, you are probably the absolute owner of the watch and clothes that you wear. They are yours exclusively until you do something, like sell them or give them away.

Ownership is qualified where it exists only so long as possession lasts. According to English Commonlaw, wild animals living in their natural state are considered to be ownerless. (Or as in Manitoba, the property of the Crown until killed or captured according to The Wildlife Act.) If they are captured, they only belong to the captor as long as she or he is capable of keeping them in captivity. If they escape, the owner's qualified title in them is lost. Ownership in water, oil and gas may also be by qualified title.

Q. WHAT CAN BE DONE WHEN SOMEONE WRONGFULLY INTERFERES WITH ANOTHER'S PERSONAL PROPERTY?

There are no legal actions specifically for personal property law. When someone interferes with another's personal property, she or he can be sued in tort, or if there was a contract, for breach of contract. An action will lie in tort, for example, if someone converts someone else's property to their own use. They have deprived you of your right of possession and you may sue. Such a situation would be if someone steals apples from your tree and eats them, or if a storekeeper mistakenly delivers your purchased goods to someone else. You may sue to recover the value of the goods you lost. In some cases it may also be possible to

recover the actual goods, and not only money for their value.

Q. WHAT ARE THE METHODS OF ACQUIRING TITLE TO PERSONAL PROPERTY?

The following methods can be used to acquire title to personal property:

Occupancy

Occupancy means acquiring title to ownerless things by taking physical possession of them. In English/Canadian commonlaw, ownerless things are rare. As previously mentioned, the commonlaw regards wild animals as ownerless things, so when you catch a fish, or trap a rabbit, you acquire title by occupancy.

Creation

A second way to acquire title to things not previously owned, is to create or construct something new. You would have title to that newly created thing. For example, the author of a book creates a copyright, which is a form of property.

Accession and Confusion

Accession refers to an owner's right to all which his or her property produces (eg. a cow's calves) and all that is added to his or her property (eg. a tape deck installed in a tractor).

Confusion of goods occurs where goods belonging to different persons get so intermingled that they can no longer be distinguished. The parties involved become owners in common of the mixed property. Confusion can occur, for example, where similar goods belonging to different people get mixed together during shipping. If the confusion occurs because of the wrongful act of one of the parties, however, the innocent party becomes sole owner.

Transfer of Title

The usual method of acquiring title to goods is to obtain it from someone else. This includes by way of sale, mortgage and gift. The cardinal rule concerning transfer of title is that no one can give away better title than their own. In the case of a gift, the donor can give someone possession of the goods, but can give them no better title than that, if s/he had none.

For example, you loan you chain saw to John, who turns around and sells it to Fred for \$100. Fred does not

get valid title from John, because John did not have Valid title to give. You could claim your saw back, while Fred would be left to sue John for the \$100 he paid.

There are however, (just as with all legal rules), some exceptions to this rule. The more common ones are outlined next.

APPARENT AUTHORITY, APPARENT OWNERSHIP (SECTION 23 OF THE SALE OF GOODS ACT)

If the owner of goods makes it appear to a buyer that someone selling for him or her has authority to sell the goods, good title passes to the buyer. The owner cannot change his or her mind and try to recover the goods from the buyer.

SECTION 23(b) OF THE SALE OF GOODS ACT

Good title to goods will pass even from a seller who does not own the goods when the sale is made 1) under a court order of sale 2) by executors of estates 3) under statutory power of sale such as a garagekeeper's lien.

SECTION 24 OF THE SALE OF GOODS ACT

Good title passes to a buyer who has no notice of a defect in the title of the seller. An example of this would be if Sally sells her tractor to Bill and Bill gives her a worthless cheque. Bill's title to the tractor would be voidable. This means it is good until Sally notifies him that the contract is no good (because of his cheque), or if she completes all reasonable steps to tell him and recover the tractor. Until she does this, Bill can sell the tractor and pass good title to a third party, and Sally would have to sue Bill for the purchase price.

MERCANTILE AGENTS - SECTION 3(1) OF THE FACTOR'S ACT, AND SECTION 23(a) OF THE SALE OF GOODS ACT.

These sections apply where the seller is a mercantile agent. This is someone who has the authority to sell or buy goods as an agent for an owner of the goods, and is usually in the business of doing this for others. If

- the mercantile agent is in possession of the goods with the owner's consent for a purpose connected with what a mercantile agent usually does,
- the mercantile agent sold the goods in the ordinary course of business as such an agent, and
- the buyer buys the goods from the mercantile agent in good faith,

the buyer receives good title to the goods even if the owner really did not want the goods sold.

Q. WHAT IF I FIND SOMEONE ELSE'S LOST PROPERTY?

The basic rule is "the finder of lost goods acquires good title against all the world except the true owner". Possession is the key factor in finder's cases. When there are competing claims for the right to keep lost goods, one must look at who had prior possession. Generally, if you find lost goods on a public street, or other public property, your claim to the goods cannot be defeated by anyone except the true owner. However, if you find the goods on someone else's property, the landowner may be able to claim prior possession of the goods even if they weren't really his. He could say that because he owns the land and everything on it, he owns the lost article. His claim would probably defeat yours if you found the goods attached to or under his property, but if you found it lying on the surface, he would have to show that he knew of its existence and had exercised some control over it.

If the finder is an employee who finds something during the course of his or her employment, the employee's title is inferior to that of the employer, so the employer acquires title against all but the true owner.

No one is obligated to pick up lost articles, but if you do, you become responsible to the true owner. You have a duty of care with respect to the article, and will be liable to the true owner for gross negligence or converting the goods to your own use.

Q. WHAT ABOUT GIVING SOMEONE A GIFT?

A gift is a free transfer of title to goods. A gift can legally be given between living persons, by will, or by someone in contemplation of their death. Remember though, that the donor can transfer no better title than s/he has. The law is very strict in requiring clear evidence that a gift has in fact been made. A promise of a future gift is unenforceable unless it is contained in a written document signed under seal, or is part of a good contract.

Problems usually arise in gift situations when a person is trying to avoid creditors by saying that they do not own property any longer, but have given it to someone as a gift. In this situation, there must be clear evidence that a gift had in fact been made.

The clearest evidence of this is actual delivery of the goods from the donor to the recipient. There must also be an intention to transfer ownership. If manual delivery of the item is impossible, the courts have accepted some other act which passes control of the chattel to the new possessor, such as handing over the key to a car instead of the car itself.

Problems of showing delivery may also arise where the donor and the recipient live in the same house, and so appear to possess everything together. More than mere words of gift are required. It would not be enough then, to simply say, "Here dear, I'm giving you the sofa." The court will look at the situation to see whether the donor has done all s/he reasonably could to transfer possession.

Sometimes gifts are given in contemplation of death. A dying person may intend to give someone a gift, which only taken effect after they die. The recipient would only get absolute title to the goods then. The gift is automatically revoked if the donor survives the contemplated death.



Q. WHAT IS BAILMENT?

Bailment is a situation where one person has legal possession of another's goods, according to an agreement between them. The person who owns the property and has agreed to deliver it to someone else is the bailor and the person who receives the property is the bailee. The bailee's possession of the goods is temporary and there is an understanding that the identical goods will be returned to the owner. A common example of a bailment situation is a drycleaner's. The owner of the clothes is the bailor, and delivers clothes to the cleaner (the bailee) on the understanding that they will only be kept until they are cleaned, and that the identical clothes will be returned.

Transfer of ownership does not occur in a bailment, but transfer of possession does. A bailment is not an exchange, because the same goods must be returned. Depositing money in your bank account is not a bailment, because you do not get the identical bills and coins back later.

A bailee has a certain responsibility with the bailor's goods. The extent of that responsibility depends on the nature of the bailment, however. There is more responsibility placed on the bailee if s/he is being paid for some service while the goods are in his or her possession, than if s/he is doing the other person a favour by keeping them. Basically, a bailee must treat the property with reasonable care and keep it free from damage. Bailees have a duty not to be negligent with the goods.

Q. IS THERE A WAY IN WHICH BAILEES CAN LIMIT THEIR LIABILITY IF THEY LOSE OR DAMAGE THE BAILOR'S PROPERTY?

A clause in a contract which limits liability is called an "exemption clause". People who are in the business of being bailees (eg. parking lost attendants, dry cleaners, coat check persons) typically exempt themselves from liability for negligence, by including such a clause in the contract of bailment. Next time you check your coat at a restaurant, look at the ticket you receive or the sign on the wall. It will usually say something like, "NOT RESPONSIBLE FOR LOST ARTICLES". This type of arrangement is acceptable providing the parties have freely contracted for it. This means that you know the conditions and are willing to accept those terms.

In a great many transactions however, you are not aware of the exemption. For example, when you purchase an airline ticket you contract with the airline according to their terms as set out on the ticket. If you were to read the fine print on the ticket you would probably find a clause exempting the airline from liability from loss or damage to your baggage, however caused.

Even if you do notice this clause there is probably no room for negotiation. Can you imagine trying to bargain with the company to get them to take responsibility for your luggage? You and the airline definitely have unequal bargaining power in this situation. You either accept their terms or you don't fly.

The courts have stepped in to protect the consumer's interests in this type of situation, and where the exemption clause is wholly unreasonable. One way is that if it can be shown that the clause was not introduced until after the contract was made, it is not considered to be part of the contract because it came too late. The clause must also be printed or displayed in such a way that the average person would have noticed it before making the contract. This will not protect you however, if you have signed the document. The general rule is that the signer is deemed to have read the document and to have contracted on those terms. An ambiguous exemption clause will be interpreted by the courts as narrowly as possible, and against the interests of the writer of the clause (or the party seeking its protection from liability).

The courts are generally reluctant to interfere with a contract once it is made, however. They will probably only do so where the parties are of unequal bargaining power and the weaker of the two has been unfairly bound to an unreasonable clause.

*"Oops, it musta
shrunk!"*



Q. WHAT IS INVOLUNTARY BAILMENT?

Involuntary bailment refers to a situation where the bailee is saddled with someone else's property, although neither party agreed to it. For example, you are an involuntary bailee when someone else's property is mistakenly delivered to your house, or when you accidentally pick up someone else's groceries. The involuntary bailee does not appear to have to do anything about the goods, but if s/he chooses to meddle with them, s/he must exercise reasonable care.

Q. WHAT IS A PLEDGE?

A pledge of goods is a form of security for a debt. The debtor (pledger) delivers his/her goods to the creditor (pledgee), who keeps them until the debt is discharged. The pledgor does not lose title to the goods, only possession of them. The pledgee does not gain ownership of the goods, but merely possession and all of the corresponding rights that go with possession. The right to sue someone else who interferes with this possession, the power to sell the pledged chattel should the pledgor default in payment of the debt, are two of those rights.

A pledge of goods is a form of bailment. As such, the rules of bailment apply. The pledgee is liable for ordinary negligence and must take reasonable care of the pledged goods.

Q. WHAT IS A LIEN?

A lien is the right in one person to possess goods belonging to another until certain debts or charges against the goods are paid. Unlike a pledge, the lienholder does not generally have the right to sell the goods, but it may be contracted for, or provided by statute.

Some types of liens are regulated by statutes such as The Warehouseman's Lien Act. This Act gives a warehouseman the right to keep possession of goods until the owner pays the charges and to eventually sell the goods if the debt remains unpaid.

The Garagekeeper's Act gives any business that services vehicles a right of lien upon vehicles for services rendered. If the car is still at the garage, they can keep it until the bill is paid. The Act gives the garagekeeper the power to sell the vehicle if the debt has not been paid within two months. The vehicle must be sold at public auction, and there are rules regarding advertising and sale.

If, under the Act, a garagekeeper is detaining a vehicle, there is a course of action for the owner who wants to dispute the garagekeeper's claim. The owner must pay into court the amount of the debt plus 10% or \$50.00, whichever is less. The lien ceases once the garagekeeper receives notice of the payment. At this point, the owner can get the car back. If the garagekeeper refuses to give it up, s/he will be guilty of a criminal offence. The garagekeeper then has thirty days to start a law suit against the owner for the debt owing. If the garagekeeper does not start an action within that time, the owner can get back the money that was paid into court. If the dispute goes to court, the owner's money is paid out as the judge directs.

THE PERSONAL PROPERTY SECURITY ACT

When purchasing an item of personal property, or when taking it as collateral for a loan, you want to be able to determine if the person or corporation has the right to sell or pledge the item, and that no other person or corporation holds title to the item or holds some form of lien against it. A personal property security registry has been established under the Act. This registry allows any individual who is dealing with an item of personal property to determine if any security interests are registered against that item. A search of the personal property registry will provide you with a warning of the existence of two types of liens: 1) security interests perfected by registration; and 2) garage keeper's liens.

Q. WHAT ARE THE BASICS OF THE REGISTRY SYSTEM?

An understanding of the basics of the system will aid you in any inquiries that you may want to make about the system.

Property belonging to a person or a corporation may be pledged as collateral to another as a guarantee. This may be done when a loan is obtained, and the debtor pledges personal property as a guarantee that the loan will be repaid. If the loan is not repaid the lender may be able to repossess the property. The lender, called the secured party, is said to have a security interest in the property. If the secured party registers the security interest in the personal property registry, then this interest can be maintained even if the property is sold by the debtor.

Q. HOW DO YOU SEARCH THE PERSONAL PROPERTY REGISTRY TO ENSURE THAT THE APPARENT OWNER OF THE ITEM IS IN FACT THE REAL OWNER, AND HAS THE RIGHT TO SELL THE ITEM OR PLEDGE IT AS COLLATERAL?

You can go to any branch enquiry office, located in the following centers: Beausejour, Brandon, Dauphin, Flin Flon, Killarney, Minnedosa, Morden, Portage la Prairie, Russell, Selkirk, Swan River, The Pas, Thompson or Virden. When you have paid the appropriate fee, you will be connected by telephone to the central registry office in Winnipeg.

You could also go to the central registry office on the 15th floor of the Woodsworth Building at 405 Broadway Avenue, in Winnipeg. After paying the appropriate fee, the search will be done while you wait.

If none of the above methods are possible, the enquirer could mail an enquiry to the registry office. Mail enquiries generally take a longer period of time to complete.

The actual search is done by an enquiry operator, who uses a terminal hooked to the computer. The enquirer may request a printed certificate showing all the information displayed during the course of the enquiry.

Q. WHEN SHOULD A SEARCH OF THE PERSONAL PROPERTY REGISTRY BE MADE?

No search is required if the personal property in question is new or used, and is being purchased from a dealer, and the sale is in the ordinary course of business of the dealer. This is because the purchaser takes the property free of any security interest in the property created by the dealer, and a responsible dealer will guarantee that the property is free of security interests.

But if the personal property is being purchased privately, the purchaser should take steps to protect himself/herself from risks normally assumed by the dealer. There is a possibility that the property may have been previously financed by the seller or by a previous owner, and that an undischarged security interest may exist. Therefore, the name of the seller and of each previous owner should be searched for an outstanding security interest. With automobiles, a search by serial number should also be made.

Q. HOW DOES ONE REGISTER A SECURITY INTEREST?

A security interest is registered by presenting a correctly filled out financing statement (a document of a prescribed form required by the Act), accompanied by the appropriate fee, at the personal property registry. This can be done either by mail or in person. The registry office is located on the 15th floor of the Woodsworth Building at 405 Broadway Avenue, in Winnipeg.

Registration gives the secured party the legal right to enforce his/her interest against third parties, and may give preference in the event of the debtor becoming bankrupt.



What do you have that tells a dear friend we are foreclosing his mortgage?"

THE SALE OF GOODS ACT

The Act was first passed in 1893 by the British Parliament. The Act has since been adopted, almost word for word, by all of the provinces in Canada, except Quebec. The Act was intended to codify and simplify some of the contract principles that had been developed by early cases.

Q. TO WHAT TYPES OF CONTRACTS DOES THE ACT APPLY?

To have the Act apply, the subject matter of the contract must be "goods", and not real estate or services. The following would be examples of goods: machinery and equipment, furniture and appliances, grain, and lumber. To have the Act apply, money must also form part of the transaction, such that the straight barter of goods does not fall within the Act.

It must be noted that the Act uses the word "condition" to mean a major or essential term of the contract, the breach of which relieves the injured party from further duty to perform the contract if he/she so elects. The word "warranty" is used to mean a minor or non-essential term, the breach of which does not relieve the injured party from the contract. The injured party must perform his/her obligations, but may sue for damages.

Even though the Act gives both parties protection, the buyer must still take care to examine what he/she is buying if the goods are available. This applies only to the quality of the goods, and not their ownership.

Q. WHAT ARE THE MORE IMPORTANT TERMS OF A CONTRACT OF SALE IMPLIED BY THE ACT?

The Act provides that in a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is an implied condition that the seller has the right to sell the goods. There is also a warranty that the goods shall be free from any charge of encumbrance in favour of any third party, not known to the buyer before or at the time when the contract is made.

The Act states that where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. The Act also states that if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. So after examining a sample of grain, it being of a certain grade and variety, you decide to buy a thousand bushels of it. When it is delivered, you discover that the grade is the same as the sample, but not of the same variety, you can reject the grain and get your money back, or accept the grain and sue for damages.

The Act makes two exceptions to the rule that the buyer must exercise care as to the suitability and quality of the goods, such that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a particular contract of sale except:

- 1) where the buyer makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for the purpose;
- 2) where the goods are bought by description from the seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality. If the buyer has examined the goods, there shall be no implied condition as regards defects which the examination ought to have revealed.



The act also states that in the case of a contract for sale by sample, there are the following implied conditions:

- 1) the bulk shall correspond with the sample in quality;
- 2) the buyer shall have a reasonable opportunity to compare the bulk with the sample;
- 3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

It must be noted that the seller and the buyer could agree to alter the above implied terms so that a contract might contain an express term that relieves the seller from any liability imposed by the implied terms.

Q. WHAT DOES THE ACT PROVIDE IN REGARD TO PAYMENT?

Usually, the time of payment will be specified in the contract. The act provides that if the parties do not otherwise agree, the payment for the goods is to take place at the time of delivery.

The courts have interpreted the time set for payments as a warranty, unless the parties have agreed otherwise. So, if a seller is not paid on time, he or she is not entitled to cancel the contract and have the goods returned. He or she must sue for the recovery of the price and/or damages.

Q. WHAT DOES THE ACT PROVIDE IN REGARD TO DELIVERY?

The delivery terms in a contract relate to three matters : -quantity to be delivered,
-time of delivery
-place of delivery.

A term specifying the quantity of goods to be delivered is a condition. So, if the seller delivers a greater or lesser quantity than that contracted for, the buyer may choose to cancel the contract and reject the goods. The buyer could also accept the delivered goods and pay for them at the contract rate.

The time specified for delivery is also a condition. If the goods are not delivered on time, the buyer may cancel the contract. If the parties do not specify a particular delivery date, but merely provide that the goods are to be delivered as soon as possible, then the time for delivery is a reasonable time, taking into account all circumstances.

Normally, the place of delivery is either the seller's business, or where ever the goods are located when the contract is made. The parties could provide differently, however, or a different intention could be implied from trade custom.

Q. WHEN DOES THE RISK FOR LOSS CAUSED BY DAMAGE TO OR DESTRUCTION OF THE GOODS PASS FROM THE SELLER TO THE BUYER?

The parties to the contract may agree as to when the risk passes, but if they don't the act sets down a number of rules.

RULE I. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property passes to the buyer when the contract is made. It does not matter if the time for delivery or the time for payment have been postponed.

For example, on May 1, 1982 you go to John's farm and agree to buy a bull, but it is agreed that John will keep the bull until May 15, when he will deliver it to you and you will pay for it. The bull is kept in a barn, but the barn and the bull are both destroyed by fire on May 10. Since the property in the bull has passed to you, John will be able to recover the purchase price from you. This is assuming of course that the fire was not caused by John's negligence.

RULE II. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them in a deliverable state, the property does not pass until such things are done and the buyer has notice that it is done.

So, suppose you agree to purchase a tractor on terms from Smith that before payment and delivery, Smith is to replace the tires. Before replacement, however, the tractor is stolen. Since the property in the tractor does not pass to you until the tires have been replaced, and you have been given notice of the replacement, you are not bound to pay Smith the purchase price.

RULE III. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do something to the goods for the purpose of ascertaining the price, the property does not pass until this act is done and the buyer has notice of it.

Suppose you agree to purchase a bin of wheat from Jones at a price of \$4.50/bu., but before the quantity of wheat can be determined, it is stolen. Since the property in the wheat has not passed to you at the time the grain is stolen, you are not liable to pay Jones any of the purchase price. The goods were still at Jones' risk.

RULE IV. Where goods are delivered to the buyer on approval or other similar terms, the property passes to the buyer:

- 1) when he or she signifies approval or acceptance or does any act adopting the transaction;*
- 2) if he or she does not signify acceptance, but keeps the goods without giving notice of rejection, then if no time has been fixed, on expiration of a reasonable time.*

So, say you take delivery of a chain saw on approval and the seller says, "If you are not satisfied with this saw, return it by May 1, 1982." On May 5 you still have the saw, but on May 6 it is stolen. By this time, the property in the saw has passed to you and you are therefore liable to pay the full purchase price.

RULE V. Where there is a contract for the sale of future goods by description, and goods of that description are appropriated to the contract, either by the seller or the buyer with assent, the property in the goods passes to the buyer.

Suppose you go to your feed supply company and order five tons of feed supplement. At some point in time, the company sets aside the amount for you. Before you pick it up, it is destroyed by fire. The loss of the feed would be the seller's because property has not yet passed to you. This is because the setting aside of the feed does not amount to appropriation of the goods.

If the feed had been loaded onto your truck at the time of the fire, this would amount to appropriation of the feed to the contract. Therefore, property in the feed would have passed to you and you would be liable to pay the purchase price.

"THIS LITTLE BABY IS FULLY AND UNCONDITIONALLY
GUARANTEED UNTIL YOU DRIVE IT OFF THE LOT."



THE CONSUMER PROTECTION ACT

As the title of the Act suggests, this Act is intended to protect the consumer. Since we all are consumers at one time or another, this Act is of importance to all of us.

Q. DOES THE ACT APPLY TO THE SALE OF ALL GOODS AND SERVICES?

The Act does not apply to the sale of all goods and services. Four main requirements must be met: 1) generally, the goods must not be bought for resale; 2) the goods must not be sold to a corporation; 3) the price of the goods or services must not exceed \$25,000; and 4) the goods or services must not be used by the purchaser for the primary purpose of carrying on a business. Nor does the Act apply to any sale of farm machinery and equipment to which the Farm Machinery and Equipment Act applies.

Unlike the Sale of Goods Act, one cannot contract out of the provisions of The Consumer Protection Act.

Q. WHAT ARE SOME OF THE MAJOR PROVISIONS OF THIS ACT?

Door-to-Door Sales

Every door-to-door sale (any sale made elsewhere than at the seller's regular place of business by a salesman you did not contact) has special rules: 1) you may cancel the sale at any time within four days after the sale by sending a written notice to the company at the address shown on the sale contract or on the invoice the salesman gave you. You don't have to have a reason for cancelling the sale, but it can be that you have simply changed your mind; 2) if you cancel, you are entitled to your money or deposit back and the return of any trade-in given. You must return the goods that you purchase; 3) at the top of the sales form there must be printed a statement of your right to cancel and the address to which you can send the cancellation letter within the four day period. A copy of this form must be left with you at the time of purchase; and 4) any door-to-door salesperson is required to be licenced by the Consumer's Bureau and his/her company is required to post a bond with them. You should ask to see this licence and if the person is not licenced, you should refuse to deal with him/her.

Disclosure of Cost of Borrowing

Under the Act credit buyers and money borrowers have a right to know exactly how much the buying and borrowing is going to cost them. Any agreements should contain a clear description of the goods, actual cash price of the goods, plus any additional charges, down payments and/or the value of trade-in, total amount of credit finance charges and so forth.

Purchase credit agreements must show the total amount of credit finance charges in dollars and cents and as an annual percentage rate; charges for insurance premiums, if any; actual fee to provincial authorities for registration of a document; the amount, due date and frequency of payments; the unpaid balance of the cash sale price; delivery or installation charges; and cash prices of any services included in the sale.

Debt Prepayment

The Act permits buyers and borrowers to prepay their debts at any time before the full amount falls due. Where this is done, the seller or lender can only collect the amount of the loan or purchase, plus credit costs that have been earned to date.

Relief Against Acceleration and Forfeiture

No one can force a debtor in arrears to pay the full balance owing on an installment contract if all payment in arrears and default charges are paid. If an agreement provides for acceleration (that is, the complete balance of a debt becomes due and payable on default), the Act allows you the right to pay your account up to date. Once all payments in arrears and default charges are paid, you can continue making regular payments according to the terms of the contract.

In situations where the seller has reasonable cause to believe that the security (collateral) is in jeopardy, and the agreement so allows, the seller may accelerate and demand that the full balance owing be paid. When this occurs the buyer may apply to the court for relief from this acceleration.

Under the Act, a borrower cannot be forced to forfeit his/her interest in goods used as collateral once the payments in arrears and default charges are paid.

It must be noted that relief against acceleration and forfeiture applies to all installment debts, regardless of value, except: 1) debts secured on real property; 2) debts that arose out of the sale of real property; 3) and debts owed by a corporation.

Conditional Sales Agreements

Stores who sell their goods on an installment plan often require that their customers sign a "conditional sales agreement". With a conditional sales agreement, the buyer obtains possession of the goods immediately, but ownership remains with the seller or the finance company until payment is made.

The Act provides that in every sale involving a conditional sales agreement, the contract must be in writing and signed by the buyer. The agreement must include the following: 1) the description of the goods; 2) a statement that the title to the goods is not to pass to the buyer on delivery; 3) the conditions which must be fulfilled by the buyer before he/she receives title; and 4) the events which must take place before the seller has a right to repossess the goods.

Because title to the goods remains with the seller until the required conditions are met, the seller is able to repossess the goods if the buyer defaults on the payments. Under the Act, a seller cannot repossess the goods when the balance owing is less than twenty-five percent of the agreed price of the goods, unless a court order or the buyer's written permission is obtained.

Q. WHAT DOES THE MANITOBA CONSUMER'S BUREAU DO?

The Consumer's Bureau is the agency that administers the Act. The Consumer's Bureau has the following responsibilities: 1) it issues any of the licenses that are required under the Act; 2) it mediates and investigates complaints of breaches under the Act, and prosecutes offenders when necessary; and 3) it provides information of interest to consumers.

PEANUTS

featuring
"Good ol'
Charlie Brown"

by Schulz

DIRECTOR OF
EVERYTHING



REFERENCES - FARM MACHINERY AND EQUIPMENT

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TAX LAW

What follows is a discussion of taxation. At best it can only be a brief outline of the tax system in Canada. For further detail you should seek professional assistance.

It must be noted that tax law is one of the most complex areas of law, and to make matters worse, it is always being changed by parliament. In fact, some of what is said in this chapter could be changed by the end of the year. So what follows, is an attempt to give you a feel for the system.

RECORD KEEPING

Q. WHAT TYPES OF RECORDS MUST I KEEP?

You must keep a record of all of your business transactions so that you will be able to determine your profit or loss at the end of the year. Therefore you will need a day-to-day record of your receipts and expenses together with your deposit slips, bank statements and cancelled cheques. Generally a columnar book with separate pages for income and expenses is used. A basic book keeping course would outline how such records should be kept.

You must also keep a permanent record of assets on which you may claim Capital Cost Allowance or Eligible Capital Expenditure. The record should show from whom the asset was acquired, its cost, and date of purchase. When the asset is sold or traded, the record should show the date of disposal and the amount received or allowed on trade.

Revenue Canada does not require that any particular record book be used. Many provincial Departments of Agriculture have prepared record books that can be used for Income tax purposes.

Before you destroy any of your records you should receive permission from your District Taxation Office.

Q. HOW DOES ONE DETERMINE FARM INCOME?

Farmers can calculate their income by using either the "cash" or "accrued" method of accounting (this choice is available for sole proprietorships, partnerships, and corporations involved in farming).

Under the cash method income is reported only when the taxpayer has received money or money's worth. The cash method takes expenses into account only when they have been paid.

Under the accrual method income is reported upon the earlier of: 1) the time at which the taxpayer receives money or money's worth, and 2) the time that a receivable arises. That is, you report your income in the year earned, and it doesn't matter when the money was actually received.

Under the accrual method expenses are taken into account upon the earlier of: 1) the time at which the taxpayer pays the expenses, and 2) the time that a liability for the expense is incurred. That is, you take your expense into account in the year that it is incurred, and it doesn't matter when the expense was actually paid.

Q. WHAT TRANSACTIONS MUST I INCLUDE IN MY INCOME?

If you deliver grain to a licensed public elevator or process elevator, and a case ticket is issued, you are considered to have received payment at that time, and this amount must be included in your income for that year. If you are issued a deferred cash purchase ticket, and it provides for payment at a date that is after the end of the fiscal period in which the grain was delivered, you must report this as income in the following fiscal period.

Amounts received as stabilization payments or refunds of levy under the Western Grain Stabilization Act and advance payments under the Prairie Grain Advance Payment Act are income of the year in which they were received.

Receipts from the sale of livestock must be included in income. If you give livestock or other saleable items to your spouse or children, the fair market value of these gifts must be included in income. Any compensation for the destruction of animals pursuant to

the Animal Contagious Disease Act must be included in income either in the year of destruction or the following year.

Patronage dividends received from a cooperative are to be included in income. Provincial and federal gasoline tax rebates must be included in your income or deducted from your expenses.

If a government or its agency makes a grant in order to increase your income or reduce your expenses, and the amount paid is related to an income deficiency or to specific expenses, that grant is to be added to your income or deducted from the specific expenses (e.g. a milk subsidy). A government grant received to assist you in the purchase of a depreciable asset reduces the cost of the asset for capital cost allowance. The above is not an all inclusive list of what should be included in income, but only meant to cover some possible uncertainties.

Q. IF I RECEIVE A CHEQUE AT THE END OF THE YEAR BUT DON'T CASH IT UNTIL THE FOLLOWING YEAR, IN WHICH YEAR DO I RECORD IT AS INCOME?

Revenue Canada (in Information Bulletin IT-433) takes the position that the value of a cheque that is received by a taxpayer who computes his income using the cash method is considered to be income at the time he receives the cheque from a person who was indebted to him. The following conditions must be met however: (a) the debt must be payable at the time the taxpayer received the cheque, (b) the debt is of such a nature that it would be income of the taxpayer if it were paid in cash, (c) the cheque does not have any conditions attached to it such as, for example, post-dating or an arrangement that the cheque is not to be used for a specified time, (d) the cheque is honoured on presentation for payment. When a debt is not payable at the time a taxpayer receives a cheque, the value of the cheque is considered to be income at the earlier of: (a) the time the cheque is cashed or otherwise negotiated, or (b) the time the debt becomes payable.

Q. WHAT TRANSACTIONS CAN I DEDUCT FROM MY INCOME AS EXPENSES?

In a business enterprise, all expenditures incurred to earn income can be deducted. A personal expenditure, for example a purchase of a T.V. for leisure time is not deductible because it was not laid out for the purpose of producing income. A business expenditure is not deductible if you can't prove that it was made, or it is unreasonable or artificial.

Wages paid to employees may be deducted as expenses. This would include wages paid to your children, and spouse, so long as: (a) they were actually paid, and (b) the amount was reasonable.

Any money spent on the renting of land and building may be claimed as an expense.

Interest paid on money borrowed for the purpose of earning income is also deductible as an expense. So, for example, if you borrow money to purchase fertilizer or chemicals, the cost of borrowing this money, that is the interest, is deductible as an expense.

If you use your car in your farming business, you may deduct that portion of the expenses that relate to the business. For example, say your car expenses were \$1,000, you drove a total of 20,000 miles and of this 15,000 miles were driven because of farm business. You would be able to deduct the following as an expense:

$$\frac{\text{Business mileage}}{\text{Total mileage}} = \frac{15,000}{20,000} \times 1,000 = \$750.00$$

Of course, you must be able to prove these expenses with receipts.

Any legal fees paid to earn income are deductible. But if these fees were incurred so that you could purchase a capital asset, these fees are not deductible, but must be added to the cost of the asset. This asset would then be subject to Capital Cost Allowance.

If utility and other expenses can be allocated between the farm business and farm house, you may deduct as an expense that portion that relates to your business.

For further information on this area, consult your accountant or lawyer.

TYPES OF FARMERS

Q. WHAT ACTIVITIES CAN BE CLASSIFIED AS FARMING?

The Income Tax Act defines farming as including the "tillage of soil, livestock raising or exhibiting, maintaining of horses for racing, raising of poultry, fur farming, dairy farming, fruit growing and the keeping of bees, but does not include an office or employment under a person engaged in the business of farming." Revenue Canada, as stated in Interpretation Bulletin IT-156, "does not consider a feedlot operation to be farming unless (a) most of the animals in the feedlot are fed for at least three months until they attain an acceptable market weight, and most of the animals in the feedlot are owned by the operator."

This issue is important because once it has been established that a particular operation is a farming business, special rules apply. One of these special rules permits farmers to compute their income on the cash basis rather than the accrual basis (most other businesses must report their income on the accrual basis). Another allows the deduction of a percentage of the repairs and capital cost allowance on the farm home and amounts with respect to utilities, fire insurance, taxes, etc. Farmers are able to transfer the farm business to their children without having to pay taxes on capital gains.

The Income Tax Act provides that "where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income", the amount which may be deducted in respect of farming losses in these circumstances is limited to \$5,000, made up of the first \$2,500 of the loss, in full, plus one half of any loss between \$2,500 and \$7,500. Farmers can therefore be grouped into three categories: full time farmers, bona-fide part-time farmers, and "hobby" farmers.

Full time farmers may deduct the full farming loss, and if there is any of this loss that hasn't been absorbed, it can be carried over to other years. A full time farmer is also entitled to average his income every five years.

A bona fide part time farmer is a person who farms with the expectation of profit, or eventual profit, but where farming is neither the chief source of the taxpayer's income nor part of it. In this situation the taxpayer's deduction in respect of a loss is restricted to \$5,000. This would occur in a situation where for example, a schoolteacher buys some farm land and farms as a sideline.

A hobby farmer is a person who has no genuine profit motive, but farms as a hobby. In this situation the taxpayer's expenditures are regarded as personal or living expenses and are therefore disallowed in full.

THE TAX YEAR

The term "taxation year" refers to a particular period of time during which income and income tax payable are calculated. This period is usually of a twelve month duration. The taxation year may be for a calendar year or a fiscal period.

The term calendar year refers to the period from January 1st to December 31st. The taxation year for an individual is always a calendar year.

The term fiscal period refers to a period of time, usually twelve months, chosen by a business as the accounting period for its annual reports. A fiscal period does not have to be the same as the calendar year. The owner of a business, that is a sole proprietorship, partnership or corporation may choose a year end other than December 31st. Depending upon the individual circumstances, this could benefit the taxpayer because of income splitting or tax deferral. Once a fiscal period is chosen it can't be changed without the approval of your District Taxation Office.

DEEMED DISPOSITIONS

Q. WHAT IS A DEEMED DISPOSITION?

A deemed disposition occurs when there hasn't been an actual disposition, but the Income Tax Act treats

the situation as if there has been. The taxpayer is then taxed as if there had been an actual disposition. A deemed disposition would occur in the following situations: 1) the change in the use of a capital asset from income-earning to non-income-earning and vice versa; 2) when a taxpayer gives up residence in Canada; 3) the making of a gift of a capital asset; 4) the death of the taxpayer; and 5) property owned by a trust is deemed to be disposed of every twenty-one years.

The deemed disposition is normally deemed to have taken place at fair market value, that is, the person who is deemed to have disposed of the property is deemed to have received proceeds equal to the fair market value of the property. The person who has acquired the property is deemed to have acquired it at a cost equal to its fair market value. But it must be noted that where a rollover occurs, it will be deemed that a disposition occurred at a value less than fair market value (roll-overs discussed later in this chapter).

BASIC HERDS

Before 1972 livestock farmers were entitled to establish a basic herd. This was established by a directive from the Department of National Revenue. This administrative procedure required approval for the number of animals in one basic herd. The basic herd was made up of mature animals, but did not comprise specific animals, that is, it represented a number of unidentified animals. The animals within the basic herd were considered to be capital assets, and the cost of their purchase was not allowed to be deducted as an expense at the time of purchase, but the average cost of the animals could be deducted when the basic herd was reduced.

Basic herds may not be established or increased in size after January 1, 1972, but may be reduced. The reduction may be optional or mandatory. There is a mandatory reduction in your basic herd where at the end of the year your total herd is smaller than your basic herd.

Revenue Canada in Interpretation Bulletin 1T-427 takes the position "that proceeds from all sales of livestock by a taxpayer in the business of farming, including those animals in a basic herd, are considered to be income." When you reduce your basic herd, you are allowed

to deduct from this income an amount equal to the value of each animal in the basic herd of December 31, 1971 times the number of animals sold.

Assume the following facts. At December 31, 1971, you have a basic herd of 50 animals with a fair market value of \$5,000 (50 X \$100). In 1980 you sell all of your cattle for a gross profit of \$25,000. From the gross profit you can subtract the cost of your basic herd. Therefore the adjusted gross profit equals \$20,000 (25,000 - 5,000).

CAPITAL COST ALLOWANCE

Many of the assets that you purchase will have a lifetime greater than one year, but will eventually wear out. The purchase, operation, and maintenance of these assets is no doubt an expense of doing business. So the question arises, "How do I write these expenses off as deductions from my income?"

We must first distinguish between "current" and "capital" expenses. Current expenses are those ordinary, regular, recurring and continuing expenditures required for the gaining or producing of income from the business. These expenses would include such things as fuel, lubricants, repairs, utilities, etc. Current expenses can be deducted from income in the year incurred.

Capital expenses are those expenses which purchase an advantage that will last for more than one accounting period or year. Because we must match the income and expenses of each accounting period, we must have some orderly system whereby part of the total capital expense (total cost) of an asset can be deducted from income. The capital cost allowance (sometimes referred to as depreciation) system provides this orderly system (it must be noted that capital cost allowance only applies to tangible assets, that is, something having or possessing physical form. For the treatment of intangible assets, that is, some non-physical asset such as goodwill, see section on eligible capital expenditures).

Because of the tax reform legislation in 1972 there are two types of capital cost allowance applicable to farming. The Part XVII method applies to depreciable

assets (those assets subject to the capital cost allowance system) used in farming and, which were being used prior to January 1, 1972. The Part XI method applies to all assets acquired on or after January 1, 1972.

Part XVII Method (for assets acquired prior to January 1, 1972)

Under this method each asset is treated individually and the rate of capital cost allowance to be applied is set out in the Income Tax Regulations with respect to each type of asset. The capital cost allowance on each asset is calculated by taking the capital cost of the asset and multiplying it by the applicable rate. This is referred to as the straight line method because the owner can claim an equal number of deductions of the same amount. For example, say you buy a cultivator for \$1,000. The regulations provide that you may deduct 10% per year. Therefore, you will be able to deduct from your income, an expense of \$100 for each of the next ten years. It must be noted that under this method if the cultivator is sold for an amount greater than or less than the undepreciated balance of the asset there is no recapture of capital cost allowance or terminal loss (to be discussed under the heading of: Part XI method). When the cultivator is sold, there could be a taxable capital gain on any gain made after December 31, 1971. It must also be noted that when an asset is disposed of under this method, the allowance for that individual asset may only be claimed for the number of months that it was available for use.

Part XI Method (for assets acquired on or after January 1, 1972)

Under this method, capital cost allowance is calculated by using the diminishing balance system. Under this system assets are grouped into specified classes, and the capital cost allowance is based on the cost of all the assets in the class less proceeds from the disposal of assets within that class and less the amounts allowed in previous years as capital cost allowance on these assets. The resulting balance remaining in a class is called the undepreciated capital cost. This can be better understood by looking at the following example:

In 1978 Farmer Jones purchases the following equipment:

<u>depreciable property</u>	<u>cost</u>	<u>class no.</u>
pull-type combine	\$ 80,000	8
cultivator	10,000	8
pull-type hay baler	10,000	8
	<u>\$100,000</u>	

We will assume that the above equipment is the only property in class no. 8. The Income Tax Act, under Part XI states that 20% is the maximum rate for class 8. So in 1978, Jones can deduct the following amount from his income: capital cost allowance = \$100,000 X 20% = \$20,000.

The undepreciated capital cost of class 8 is \$100,000 - \$20,000 = \$80,000 at the beginning of 1979. Assume that in 1979 Jones buys a mower (also class 8) at a cost of \$1,000. The undepreciated capital cost now totals \$81,000 (\$80,000 + \$1,000 = \$81,000). So in 1979, Jones will have a capital cost allowance of \$81,000 X 20% = \$16,200.

At the beginning of 1980 the undepreciated capital cost of class 8 will be \$81,000 - \$16,200 = \$64,800. Assume also that Jones sells his combine in 1980 for \$50,000. This amount must then be subtracted from the undepreciated capital cost at the beginning of 1980, \$64,800 - \$50,000 = \$14,800, leaving an undepreciated capital cost in Class 8 of \$14,800. The capital cost allowance for 1980 will therefore be \$14,800 X 20% = \$2960. The undepreciated capital cost at the beginning of 1981 will be \$14,800 - \$2960 = \$11840.

It will be obvious to the reader that the rate chosen for each class can only be an estimate of the actual depreciation for that year. Therefore a final correction in the deductions allowed may be necessary when the asset is sold and the actual depreciation is determined. This estimate is corrected by a "recapture" of past excessive capital cost allowance deductions or a further deduction for a "terminal loss". This can be understood by examining the following two examples.

Assume Farmer Jones purchases a self-propelled swather in 1978, at a cost of \$20,000. This is a class no. 10 property, and therefore depreciates at a rate of 30%. Assuming that this is the only class 10 asset, the following calculations would apply.

1978 undepricated capital cost (UCC)		\$20,000
Maximum rate 30%		
Capital cost allowance (CCA) $20,000 \times 30\% =$		6,000
1979 UCC	$\$20,000 - 6,000 =$	14,000
CCA	$\$14,000 \times 30\% =$	4,200
1980 UCC	$\$14,000 - 4,200 =$	9,800

Assume now that you sell this swather in 1980 for \$10,800. As can be seen the swather hasn't depreciated as fast as predicted by the capital cost allowance system. That is we have actually taken \$1,000 more of capital cost allowance ($10,800 - 9,800$) than was warranted. So we recapture this past excessive capital cost allowance and add it to the 1980 income.

Assuming again that the undepreciated capital cost of the swather in 1980 was \$9,800, and you sell this swather in 1980 for \$8,800. As can be seen the swather has depreciated faster than predicted by the capital cost system. That is, it has actually depreciated by a \$1,000 more than was allowed by the capital cost allowance system ($\$8,800 - 9,800 = [\$1,000]$). Since this swather was the only remaining asset of the class, Jones is allowed a \$1,000 terminal loss. That is, \$1,000 can be subtracted from his 1980 income.

Common Features of the Part XVII and Part XI Method

- 1) No capital cost allowance may be claimed on land or any growing thing such as trees or animals.
- 2) The maximum possible amount of capital cost allowance need not be claimed, that is a lesser amount may be claimed, with the unclaimed portion being saved for future use.
- 3) The value of your own labour used in the construction of an asset can't be added to its cost if your business is a sole proprietorship or partnership. If your business is a corporation it can hire you and include the cost of your labour in the construction costs.
- 4) If you use an asset partly for business and partly for personal purposes, e.g., car and farm home, capital cost allowance can be claimed only on the proportion of the cost of the asset which corresponds to the use made of the asset for business purposes.

5) Any gain that then accrues to an asset after December 31, 1971, will be subject to capital gains taxation. There can be no capital loss on the disposition of a depreciable asset.

ELIGIBLE CAPITAL EXPENDITURES

The capital cost allowance system does not allow a deduction for the cost of intangible assets. Intangible assets would include such things as the cost of goodwill, milk quotas or other Government rights. Since January 1, 1972 taxpayers have been allowed to create an account comparable to a capital cost allowance class, for these intangible assets.

The expenditures for these intangible assets are called eligible capital expenditures, and one-half of them make cumulative eligible capital. A taxpayer may deduct up to 10% of the balance of the cumulative eligible capital on a reducing balance basis. If an intangible asset is sold, one-half of the proceeds of disposition must be subtracted from the cumulative eligible capital account. The following example will help to explain this system.

In 1980 Farmer Jones buys two milk quotas at a cost of \$20,000. We therefore have an eligible capital expenditure of \$20,000.

Cumulative eligible capital	
= \$20,000 X 1/2 =	\$10,000
Maximum annual allowance	
= \$10,000 X 10% =	1,000
1981 Cumulative eligible capital	9,000
Maximum annual allowance 9,000 X 10% =	<u>900</u>
1982 Cumulative eligible capital	8,100

Assume that in 1982 Jones sells one of the milk quotas at a price of \$8,000. Therefore one-half of the proceeds of disposition must be subtracted from the cumulative eligible capital account ($8,000 \times 1/2 = \$4,000$).

1982 Cumulative eligible capital balance = 8,100
- 4,000 = \$4,100
Maximum annual allowance \$4,100 X 10% = 410/

There can also be a recapture or a terminal loss with this system. There will be a recapture where at the end of the taxation year the amounts previously written off, and one half of the proceeds of disposition arising on the sale of an intangible exceeds the cumulative eligible capital, and the excess must be included in the taxpayer's income for the year.

Where a taxpayer has ceased to carry on a business he can deduct from his income for the year, the balance remaining in his cumulative eligible capital account.

CAPITAL GAINS

A capital gain is the amount by which the proceeds of disposition of an asset exceeds its cost to the taxpayer. Before 1972 capital gains were completely outside the definition of income and were therefore not subject to tax. Since January 1, 1972 one-half of a taxpayer's capital gains are taxed. To have a capital gain (or loss) there must be a disposition of property. Therefore the winning of a prize, such as a lottery, can't be a capital gain because there is no disposition of property.

It is important to be able to distinguish between ordinary income (income from non-capital sources) and capital gains (income from capital sources) because the full amount of ordinary income is taxed, while only one-half of capital gains is taxed. In all cases this determination will depend upon the facts of the individual circumstance.

The distinction between income and capital gains is often explained by what is known as the "fruit and the tree" analogy. Imagine that in 1973 you purchase a young fruit producing tree at a cost of \$10.00 for your fruit growing business. Starting in 1974 and continuing in succeeding years, this tree produced \$200 worth of fruit per year. The revenue from the sale of the fruit is income, and the full amount is taxable. Assume that in 1980 you sell this tree for \$150.00. The increase

in the value of this tree ($\$150 - \$10 = \$140$) is the capital gain. Capital gain is the realization upon the enhancement of value to capital through the sale of an investment.

If we take the above fact situation, but now learn that you are in the business of producing mature fruit producing trees (assuming that a tree is only mature after it has produced several crops of fruit), the sale of this tree will represent income and not a capital gain.

So if Farmer Jones purchased land in 1972 at a cost of \$50,000 and sells it in 1980 at a price of \$100,000, he will have a capital gain of $\$100,00 - \$50,000 = \$50,000$. Since only one half of a capital gain is taxed, he will have a taxable capital gain of $1/2 \times \$50,000 = \$25,000$.

In regards to property purchased before January 1, 1972, the taxpayer will only pay capital gains on the increase in value of the property from December 31, 1971 ("Valuation Day").

Q. WHAT IS VALUATION DAY?

Prior to January 1, 1972, capital gains in Canada were not taxed. When parliament decided to tax capital gains, they had to choose a date on which this was to begin. It was decided that no capital gains prior to January 1, 1972 would be taxed, but any gain made on or after January 1, 1972 would be.

In order to do this, all assets must therefore have a value placed on them as of January 1, 1972. The Income Tax Act provides several different methods of valuing assets and which should be chosen will depend upon your particular situation. Your tax advisor will be able to assist you in this regard.

INVOLUNTARY DISPOSITIONS

Q. DO I HAVE TO PAY CAPITAL GAINS TAXES IF SOME OF MY BUSINESS PROPERTY IS STOLEN, DESTROYED OR EXPROPRIATED, AND I AM COMPENSATED FOR THE LOSS?

Generally you will have to pay capital gains taxes in this situation if the compensation is greater than the original cost of the property. But if you acquire a replacement for the stolen, destroyed, or expropriated property you may elect to defer all or part of what would be your gain on the first property. To qualify for this election you must acquire the replacement within two years from the end of the year in which you were entitled to receive the compensation. You must then elect in your Income Tax return, for the year you acquired the replacement property, to have the deferral apply. You must use the replacement to carry on any farming business. Generally this replacement must be the same as the former property and must be put to a use similar to that made of the former property (the election would also allow you to defer recapture of capital cost allowance).

Q. DOES A FARMER HAVE TO PAY CAPITAL GAINS TAX IF HE TRANSFERS HIS FARMING BUSINESS TO HIS SPOUSE OR CHILD?

A farmer can transfer, during his or her lifetime or in his or her will, a farm which is being used in the farming business to a spouse or child, if the recipient is a resident of Canada, without having to pay any tax on capital gains. For this purpose, a child of a taxpayer includes his grandchild and great-grandchild. This procedure whereby property with accrued capital gains can be transferred without tax consequences to other taxpayers is referred to as a "rollover". The capital gain which ordinarily would have been a taxable capital gain for the transferor is now passed on to his or her spouse or child, to be assessed at a later date, should the farm be disposed of to a person other than a spouse or child.

The rollover rules have been expanded to include a share of the capital stock of a family farm corporation or an interest in a family farm partnership which has been transferred to the taxpayer's child after April 10, 1978. The recipient must have been a resident of Canada at the time of the rollover and the property must rest 100% with the recipient not later than fifteen months after the death of the transferor, where the property is transferred as a result of a testamentary gift. Following are some specific circumstances where rollovers come into play. These rules tend to be very

complicated so it is advised that you contact your lawyer or accountant for a fuller explanation of them.

Rollover of Farm Property on Death

Briefly, the rules are as follows:

- 1) the normal rules on deemed dispositions and acquisitions on death do not apply;
- 2) Part XI farm assets, that is, assets acquired on or after January 1, 1972, are deemed to have been disposed of at their undepreciated capital cost;
- 3) land is deemed to have been disposed of for an amount equal to the deceased's adjusted cost base;
- 4) the shares of the family farm corporation or the interest in a family farm partnership are deemed to have been disposed of for an amount equal to the adjusted cost base to the taxpayer immediately before his death;
- 5) the recipient is deemed to have acquired the property at an amount equal to the deemed proceeds of the deceased;
- 6) Part XVII assets, that is, assets acquired prior to January 1, 1972, are not included in the rollover but are passed over to the child at fair market value; and
- 7) the recaptured depreciation or capital gain which ordinarily would have been taxed in the deceased's hands is now passed on to the child to be assessed if the farm of Part XI farm assets should later be disposed of to a person other than a spouse or child.

Rollover of Farm Property to a Child During the Parent's Lifetime

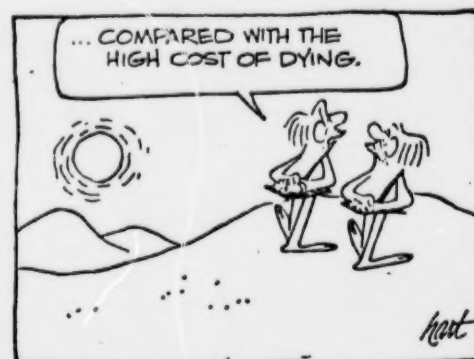
Briefly, the rules are as follows:

- 1) a farmer during his or her lifetime can dispose of farm land, and after April 10, 1978, eligible capital property in respect of his or her farm to his or her child and then defer all or a portion of accrued capital gains;
- 2) proceeds of disposition as agreed may be any amount between fair market value and undepreciated capital cost or adjusted cost base;

- 3) in the case of eligible capital property, the proceeds of disposition may be any amount between fair market value and two times the cumulative eligible capital in respect of the business immediately before the transfer;
- 4) the child's cost of acquisition is equal to the farmer's deemed proceeds of disposition;
- 5) where a taxpayer has transferred the farm to a child under the age of 18 years, taxable capital gains and allowable capital losses arising after 1974 from disposition of the transferred property by the child are deemed to be those of the transferor. This does not apply: once the child reaches the age of 18 years, if the transferor dies, or the transferor is no longer a resident of Canada; and
- 6) if the property was owned by the transferor prior to December 31, 1971, any capital gain which has accrued after December 31, 1971 is eliminated from the proceeds of disposition of the property.

Rollover of Farm Property to a Spouse

Rules similar to the above apply. But it must be noted that if before the transferor's death, his or her spouse disposes of property which has been transferred to him or her after 1971, any resulting capital gain must be reported in the transferor's income and not that of the spouse. It must also be noted that depreciable assets transferred to a spouse must be depreciated in accordance with Part XI, and not Part XVII.



PRINCIPAL RESIDENCE

Q. IS THE SALE OF MY PRINCIPAL RESIDENCE SUBJECT TO
CAPITAL GAINS TAX?

A principal residence is defined to be a housing unit or an interest therein, that meets the following qualifications:

- 1) it is owned, whether jointly with another person or otherwise, by the taxpayer in the year;
- 2) it was ordinarily inhabited in the year by the taxpayer, his spouse, or a dependant child; and
- 3) it has been designated on a special form to be his principal residence for the year, and no other property has been so designated for that year.

The amount of property included in the principal residence definition will depend upon the individual situation. The principal residence is deemed to include the land on which the housing unit stands and other land which is needed for the owner's use and enjoyment of the housing unit. Revenue Canada takes the position that this land may be up to an area of one acre, but if the total land area exceeds one acre, the taxpayer will have to show that this excess is necessary for the use and enjoyment of the housing unit.

If the property meets the above requirements, part or all of a gain on sale may be excluded from the taxpayer's capital gains. If the property has been a principal residence during part, but not all, of the period of ownership, the gain will be reduced in proportion to that part of the total period of ownership during which it was a principal residence.

Revenue Canada has stated that partnerships and corporations cannot have principal residences, and, therefore a farm home owned by these entities will not qualify for the principal residence exemption in so far as the entity itself is concerned. If the property is owned by a partnership, however, and the residence meets the definition of a principal residence, one or more of the partners may claim the exemption.

Q. HOW DOES ONE CALCULATE THE PRINCIPAL RESIDENCE EXEMPTION IF A FARMER DISPOSES OF ALL OF HIS FARM PROPERTY IN ONE TRANSACTION, INCLUDING THE FARM HOUSE?

The farmer could allocate the proceeds of disposition between his residence and the remainder of the farm property. The proceeds allocated to the principal residence would be exempt from capital gains tax.

The Income Tax Act also provides that the gain may be calculated by another method. The farmer would calculate the total gain on the disposition of the farm property (including principal residence). From this sum, the gain is reduced by \$1,000 plus an additional \$1,000 for each taxation year (beginning after December 31, 197) that the property was his principal residence. The taxpayer must elect to apply this method.

AGATHA CRUMM

by Bill Hoest



LOSSES

Q. CAN THE LOSSES OF ONE YEAR BE USED TO OFFSET THE INCOME OF OTHER YEARS?

Losses fall into three categories: 1) restricted farm losses; 2) non-capital losses; and 3) net capital losses.

Restricted Farm Losses

If a person is a bona fide part time farmer, that is, a person who operates a farm with a reasonable expectation of profit, but whose chief source of income is not farming or a combination of farming and some other source of income, a limit is placed on the amount of the net farming loss that may be deducted from other sources of income. The maximum net farming loss that may be deducted from other sources of income is \$5,000.

To be entitled to the full \$5,000 deduction a bona fide part time farmer must have losses of \$7,500. This is because the farmer is allowed to deduct the first \$2,500 loss and one half of the next \$5,000 loss. The allowable portion of the farming loss is deductible from the taxpayer's other sources of income in the year. The balance of the farming loss which is not sufficient income in the current year so that the allowable portion of the farming loss is absorbed, the unapplied portion of that loss becomes part of the taxpayer's non-capital loss for the year.

The restricted farm loss may be carried back one year and forward five years. The amount that may be deducted in any one of those years is the lesser of: 1) the taxpayer's income from farming for the year, and 2) the taxpayer's income for the year minus all deductions in computing taxable income except personal exemptions, non-capital losses, and net capital losses. In some situations the restricted farm loss can be used to reduce the amount of capital gain made on the sale of land.

Non-Capital Losses

To give a simplified definition, non-capital losses are the taxpayer's total losses from an office, employment, business or property. Non-capital losses may be carried back one year and forward five years. Non-capital losses may be used to reduce the taxpayer's net income from all sources (restricted farm losses may impose a limit). A taxpayer's non-capital loss for a year will be the amount by which his/her losses from an office, employment, business or property exceed his/her profits from an office, employment, business or property.

Net Capital Losses

The net capital loss is the amount of a taxpayer's allowable capital losses for the year that can be carried over to other years to be deducted in calculating taxable income. A net capital loss would be created by the following transaction. In 1972 Farmer Jones bought 160 acres of farmland at a cost of \$50,000 and in 1974 sold it for \$40,000. Jones had a capital loss of 10,000 (\$50,000 - 40,000), and an allowable capital loss of \$5,000 (\$10,000 X 1/2) (as only one half of capital gains are taxed, only one half of capital losses may be used as a deduction).

For a corporation, a net capital loss incurred in a taxation year may generally be carried back one year and forward indefinitely. Net capital losses of a corporation may only be applied against taxable capital gains.

For individuals, net capital loss incurred in a taxation year may also be carried back one year and forward indefinitely. But the net capital losses may be applied against taxable capital gains and other income of another year to the extent of \$2,000. (Restricted farm losses may again impose a limit.)

SMALL BUSINESS DEDUCTION

The "small business deduction" is available only to Canadian controlled private corporations. A Canadian controlled private corporation is defined as a

private corporation which is a Canadian corporation and which is not controlled directly or indirectly by one or more non-residents, one or more public corporations or a combination of the two.

A Canadian-controlled private corporation is allowed to deduct from its tax otherwise payable, 21% of its active business income for a particular taxation year. So if we assume that the basic corporate tax rate is 45% (combined federal and provincial tax), the small business deduction has the effect of reducing that corporation's tax to 25%.

But it must be remembered that this tax credit is only available to small businesses. In order to ensure this, a maximum of \$150,000 of active business income is subject to the small business deduction in any one year. This deduction is not available to a corporation if its pre-tax earnings which have not been distributed to shareholders, is in excess of \$750,000. When, after a number of years of operation the corporation's business income exceeds \$750,000, the corporation will no longer be allowed any small business deduction. (The budget proposes to raise the above amounts to \$200,000 and \$1,000,000.)

Only income from an "active" business qualifies for the small business deduction however. So the question arises, "what is an 'active' business?" While the Act does not define the term, it would appear that the term is intended to differentiate between income actually earned by the carrying on of a business and income earned solely through investment.

AVERAGING

Farmers have been given a number of methods by which their farm income may be averaged. These methods have been justified on the grounds that farmers' incomes fluctuate because of the added hazards that their businesses are exposed to. Each of the available methods will be examined briefly, but it is suggested that you get further information, if required, from your tax consultant.

General Averaging

Under this method, only the income in excess of a threshold amount is averaged, and therefore the benefits are not overly generous. This threshold amount is calculated by a formula that determines the average excess income of the years being averaged. This method only applies when one's income is rising.

Revenue Canada says that it will automatically make the averaging calculation when your income is 20% more than the average of the preceding four years and 10% more than the income of the immediately preceding year. So you do not have to elect to average, or make the necessary calculations yourself. General averaging will never increase the amount of tax payable, but will only reduce your tax liability.

But if the taxpayer chooses, he may make the necessary calculations himself, using form T2077. It has been suggested that if general averaging will be of benefit to a taxpayer, it might be unwise on his part to rely on Revenue Canada to initiate the process. But rather, the taxpayer should do the calculations and send them in with his tax return.

Block Averaging

Five-year block averaging permits a true averaging, because it applies to the total income of the taxpayer, and not just to that part of the income that exceeds a threshold amount. Block averaging is available only to individuals and not to corporations.

Under block averaging you calculate your income tax payable for the last year of a five-year period on the average income of those five years. It must be noted that the tax for each year must be paid, even if you know a lesser amount of tax will be payable when the income is averaged.

An averaging period consists of the year of averaging and four preceding years. If a return for a previous year was not filed on time, it cannot be included in the averaging period. In this case, if returns have been filed on time for at least four of the six immediately preceding years, you may group the latest four of such years with the year of averaging to establish an averaging period.

To qualify for block averaging each of the following requirements must be complied with:

- 1) the taxpayer's chief source of income in the averaging period must have been farming;
- 2) income tax returns must be filed for each of the five years regardless of whether income tax was payable for each year. For a year in which income tax was payable, a return must have been filed on or before April 30 following the end of that year. This requirement does not apply when the only amount payable was contributions to the Canada Pension Plan. For a year in which no income tax was payable, a return must be filed on or before the date that the election to average income form is due;
- 3) a year which has previously been included in a block averaging period may not be included in the latest averaging period; and
- 4) an election to average (form T2011) must be filed on or before April 30 following the fifth year.

Once a taxpayer makes an election to average his income in this manner, it is fully effective unless he revokes it as follows: 1) at any time before tax has been assessed for the year of averaging; or 2) within thirty days after the tax for the year of averaging has been assessed.

Given the same fact situation, block averaging generally results in a substantially greater saving in tax than does the general averaging calculation.

Livestock Averaging

As outlined before, farmers may report their income in accordance with the 'cash method', such that accounts receivable, accounts payable, and inventories are not taken into account. The Income Tax Act however, allows livestock farms to take into account in calculating income all or part of the value of livestock inventory, that is, a farmer may increase his income by an amount which does not exceed the fair market value of livestock on hand (other than those animals in his basic herd). In order to take advantage of this provision, the taxpayer must satisfy the following: 1) be engaged in the business of farming; 2) has elected to compute his income from that business using the cash method; and 3)

must have livestock on hand, as part of his farming business. Farming need not be the taxpayer's chief source of income, and the taxpayer may be a corporation or an individual.

In the following year the taxpayer must reduce his income by the same amount as was added to his income in the previous year. That is, if the taxpayer adds \$10,000 to his income in 1980, he must subtract \$10,000 from his income in 1981.

THE POWERS OF REVENUE CANADA AND THE RIGHTS OF
THE TAXPAYER

Q. WHAT CAN HAPPEN IF I DON'T PAY MY INCOME TAXES AND
I AM CAUGHT?

You will have to pay the unpaid taxes. In addition a penalty may be imposed on anyone who has failed to file a return as and when required. The penalty could be "an amount equal to 5% of the tax that was unpaid when the return was required to be filed" and an amount equal to 1% per month (not exceeding 12 months) of the unpaid tax.

If a person wilfully attempts to evade payment of taxes by failing to file a return as and when required, he is liable to a penalty of 50% of the net amount of the tax sought to be evaded.

If a person knowingly or negligently makes a false statement or omission on a return, he is liable to pay a penalty equal to 25% of the unpaid taxes.

In addition to the above penalties, if a taxpayer is convicted by a court of an offence under the Income Tax Act, he may be liable to pay a fine of between 25% and double the amount of the tax that he attempted to evade. A taxpayer may also be sentenced to a jail term.

Q. WHAT CAN I DO IF I CALCULATE MY TAX PAYABLE, PAY THIS
AMOUNT, BUT REVENUE CANADA REASSESES ME FOR AN ADDI-
TIONAL AMOUNT?

First of all, you must pay the additional amount assessed. You can then appeal Revenue Canada's assessment.

After you have filed an income tax return, you will receive one of two notices from Revenue Canada: 1) a verification of assessment; or 2) a Notice of reassessment. The date on the verification of assessment starts the four year limitation period running (there is no limitation period if the taxpayer has negligently, carelessly or wilfully made a misrepresentation or has committed any fraud in filing his return or supplying any information).

If the taxpayer disputes the reassessment or penalties levied by Revenue Canada, he has ninety days to file a Notice of Objection. This Notice of Objection is considered by the Appeal Section of the District and Regional Tax Office.

If the Appeal Section agrees with the notice of reassessment the taxpayer may make a further appeal within ninety days. If 180 days after filing the Notice of Objection the taxpayer hasn't heard from the Appeal Section, he may make a further appeal.

The taxpayer now has a choice between one of the following forums: 1) Tax Review Board; or 2) Federal Court - Trial Division. In the Tax Review Board no costs are awarded to either party and there is no strict adherence to formal court procedure. An appeal to the Tax Review Board will be less costly than to Federal Court - Trial Division. In the Federal Court - Trial Division costs are awarded to the winning party and there is a strict adherence to formal court procedure.

If the taxpayer has chosen the Tax Review Board and is unhappy with their decision, he may appeal it within 120 days to the Federal Court - Trial Division. A decision of the Federal Court - Trial Division may then be appealed to the Federal Court - Appeal Division. This decision may be appealed to the Supreme Court of Canada if they give permission to appeal.

Q. IS THERE A METHOD BY WHICH I CAN GET A STATEMENT FROM REVENUE CANADA INFORMING ME AS TO HOW THEY WILL INTERPRET THE INCOME TAX ACT IN RESPECT OF A DEFINITE TRANSACTION?

Revenue Canada has outlined their position on this issue in Information Circular 70-6R. Revenue Canada will attempt to make an advance ruling where there is a bona fide business purpose for the proposed transaction. It

must be noted that this is an administrative procedure only, and not required by the Income Tax Act.

An advance ruling is a statement given by Revenue Canada to a taxpayer informing him how it will interpret specific provisions of the law in regard to a definite transaction. An advance ruling will generally be regarded by Revenue Canada as binding on itself.

To obtain an advance ruling the taxpayer must draw up a detailed statement of all of the relevant parts of the circumstances in question and all of the related documentation must also be gathered together. The above material, together with a clear statement of the questions to be answered must be submitted to Revenue Canada (for more specific information see Information Circular 70-6R).

Revenue Canada takes the position that the advance ruling is not binding if there has been a material omission or misrepresentation in the statement of facts, or if the relevant law has been changed, or if the interpretation of the law has been changed by a court.

Q. WHAT POWERS DOES REVENUE CANADA HAVE TO INVESTIGATE TAX AVOIDANCE AND NON-COMPLIANCE WITH THE INCOME TAX ACT?

Information Circular 73-10R2 outlines Revenue Canada's policy in regard to tax evasion and tax avoidance. Much of the following discussion comes from that information circular.

The Income Tax Act allows Revenue Canada's investigation to seize and remove available records and documents from a taxpayer's premises. These investigators have been issued a special authorization signed by the Deputy Minister, which they are to show. Any records seized must be returned to the taxpayer within 120 days, unless a court order allowing retention has been obtained.

The Act also provides that if there is reasonable and probable grounds to believe that there has been a violation of the Act, Revenue Canada can obtain a search warrant. This allows them to search any building, place or receptacle for evidence of a violation and seize it if so found.

Revenue Canada can also make a demand for information or production of records. Failure to comply with this demand could result in a fine from \$200 to \$10,000 and/or imprisonment not exceeding six months.

A taxpayer may also be interviewed and questioned by the investigator during the course of the investigation. The taxpayer is not obliged to incriminate himself and will be given ample opportunity to make explanations or representations. It must be noted that a taxpayer is allowed to have his legal and accounting advisors present during any interviews.

Q. WHAT IS A TAX AUDIT?

A tax audit is the examination of a taxpayer's records by Revenue Canada in order to determine if he/she has calculated the correct tax payable. A taxpayer could be chosen for an audit by chance or because of information received by Revenue Canada.

There are two basic types of audits: 1) the office audit; and 2) the field audit.

The office audit is a restricted audit and it is conducted in the District Taxation Office. It will generally take only a few hours. The auditor may require that the taxpayer bring in further information, or answer specific questions.

The field audit is a more detailed examination of the taxpayer's records and is conducted at the taxpayer's place of business. It may take a few days to several weeks, depending upon the size and complexity of the taxpayer's business.

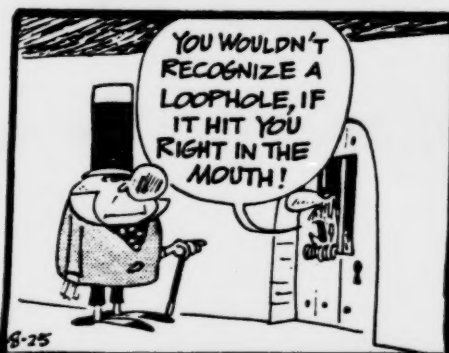
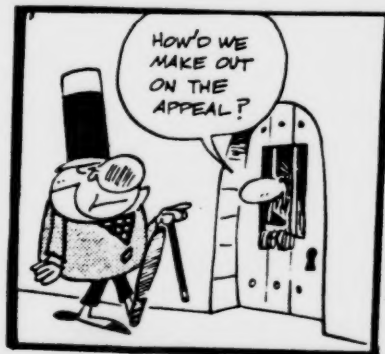
The auditor can obtain the required information in a number of ways, from an informal verbal request to a formal requirement under the Act.

If after the audit, the auditor proposes to increase the tax payable by re-assessing the taxpayer's return, the auditor will inform the taxpayer, or his/her representative. The taxpayer will then have fifteen working days in which to make representations before a notice of reassessment will be issued. This would not apply if it is suspected that the taxpayer has attempted to avoid paying taxes.

Q. IF I HAVE FAILED TO FILE A TAX RETURN AS REQUIRED OR I HAVE FILED A FALSE RETURN, IS THERE ANY WAY IN WHICH I CAN AVOID PROSECUTION?

Yes, it may be possible, as Revenue Canada encourages voluntary disclosures. If you have failed to file a return as required or have filed a false return you may avoid prosecution by making a voluntary disclosure of this fact to Revenue Canada. You will be permitted to settle your liability by paying the required tax and interest due, and any late filing penalties.

This voluntary disclosure will be verified by Revenue Canada. If they find that there has not been a complete disclosure of facts, they will not consider the disclosure to be voluntary, but a further attempt to deceive. In such a case you would be subject to prosecution.



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ESTATE PLANNING

This chapter is not intended to show you how to arrange your affairs so as to minimize your tax burden, or to insure that your desired disposition of property will be successfully carried out. This chapter will explain to you what estate planning is, and how you can get advice so as to insure that your affairs will be arranged in the best possible way. Estate planning is a complex area of the law, requiring knowledge in tax law, business law, succession law, insurance law, and property law, to name but a few. Estate planning in some cases will involve the cooperation of your lawyer, accountant, insurance underwriter, and investment counselor. Depending upon the individual circumstances, an effective estate plan may be relatively straight-forward or complex. Generally it will be your lawyer who will oversee the development of your estate plan.

Q. WHAT EXACTLY IS ESTATE PLANNING?

Estate planning concerns the orderly arrangement and disposition of one's property. This planning may emphasize the period during one's lifetime, or at death, or a combination of both. The ultimate goal of the plan will depend upon the individual.

Some may want to ensure that the minimum possible amount of tax be paid during one's lifetime and at the time of death, not caring how his property may be tied up. Others will want to ensure that their property will be disposed of according to their wishes, so that certain named individuals will receive the property and others won't. The objectives will depend on the individual.

Q. HOW DOES ONE CREATE A TAX PLAN?

First of all, you must have an objective, that is, you must have some idea as to what you are trying to accomplish. You should have some clear idea of what you would like to do before you see your lawyer in this regard, but he will be able to make further suggestions. Some of your objectives may be conflicting, but your tax planner should be able to suggest ways in which this can be resolved. These objectives could be in relation to the following areas: 1) the individual; 2) corporate income; 3) business re-organization.

After you have outlined your objectives to your lawyer, but before the actual plan is drawn up, you must gather together all of the relevant facts. Your lawyer will probably give you a list of all of the facts that will be needed. This would include such things as: income statements, balance sheets, tax returns, and account books. Your lawyer will also want to examine any agreements that you may have previously entered into. After receiving this material your lawyer will analyse

the facts and the applicable law to determine if any other information will be needed.

The next step involves the formation of an estate plan. Depending upon the situation, the plan may be very simple or more complex. Most plans will be somewhat complex. In many cases your lawyer will outline several possibilities, explaining the advantages and disadvantages of each. He should explain to you how and why he has arrived at a certain plan. It must be remembered that at this stage your lawyer will be taking into consideration objectives other than tax objectives (assuming that the minimization of taxes isn't your only goal). But tax planning doesn't end there.

The final, and probably the most important step, is implementation of the tax plan. It may be that you can implement the plan yourself, or you may have employees or other advisors who will implement the plan for you. But it would probably be advisable to have your lawyer play some supervisory role in the implementation of your estate plan.

Q. DOES ESTATE PLANNING INVOLVE THE TAKING ADVANTAGE OF "LOOP HOLES" IN THE INCOME TAX LAWS?

As a general rule a person can't be taxed unless he falls squarely within the terms of an applicable taxing statute. It has been held that a person can arrange his affairs such that his tax payable is minimized. But, contrary to popular belief, there is a limitation on how far a person can go in arranging his affairs so as to minimize his tax payable.

It must be noted that in recent years the courts have grown to dislike tax avoidance schemes which rely on legal technicalities. Courts now generally look at what is termed "substance rather than form"; that is, what actually is occurring, rather than the legal form. The following example will illustrate.

A person owned a business as a sole proprietorship. In order to decrease his income (and therefore his income tax payable), he formed a partnership with his young son. The income of the partnership was split between father and son, such that neither paid much income tax. But it was noticed that the father was still running the business and that the son was playing no major role in it. It was also noticed that the son had no real control over the income that he was to receive. So in effect the formation of the partnership did not change the business organization. So even though the form of the business had changed, the subject had not, and the father was taxed as if all of the income of the business was his.

The Income Tax Act contains provisions which are designed to prevent artificial transactions. One such provision provides that

"in computing income ... no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income."

So as not to be misleading, it must be noted that only a small proportion of estate planning brings the tax planner into this area. This area, or tax avoidance, as it is generally referred to, is only mentioned to show you that there is an outside limit on estate planning.



ESTATE PLANNING IS A LOT LIKE FAMILY PLANNING. THE ONLY DIFFERENCE...
YOU'VE GOT NOTHING TO SHOW FOR THE LACK OF IT.

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RESPONSIBILITY TO OTHERS

This chapter will briefly deal with the extent to which we must all look out for the safety of our "neighbours". For the most part, we are all free to do as we please, but only to the extent that it does not interfere with or harm others. Some areas of the law, such as responsibility for animals, are of a greater concern to farmers than to the general public.

Because many of the "wrongs" that will be discussed in this chapter occur by accident, liability insurance plays an important role. For example, if you are spraying your crop and the chemical accidentally drifts onto a neighbour's crop, you may be liable for the damage it causes. You can protect yourself from being financially crippled by purchasing liability insurance. The amount of coverage that you should have will depend upon your individual circumstances, but it must be noted that awards of over \$1,000,000 can occur, so be sure to cover yourself adequately.

NEGLIGENCE

Q. AM I RESPONSIBLE FOR MY CARELESS ACTS?

Many of the wrongs that occur in our society are due to the carelessness of others. Negligence is the branch of the law which defines the acts for which a person will be held responsible. But before the injured person will be able to collect damages for his or her injury, s/he must be able to show that the wrongdoer had a responsibility to prevent the damage from occurring, and that s/he should have foreseen that his or her actions would cause damage or injury.

One of the most common claims in negligence arises because of the negligent operation of a motor vehicle. Generally, any violation of The Motor Vehicle Act which results in an injury will constitute negligence. You could also be found negligent even if you were not in violation of the Act, but if you didn't act as a "reasonable person" would have in the particular circumstances. This would occur in a situation where you were travelling at the maximum allowable speed limit, but the road was icy.

You can be liable for negligence as a result of most any careless act. This could occur if you fail to take proper pre-cautions to safeguard your farm operations. For example, you could be held liable for negligence if someone is injured because of your careless use of farm machinery or equipment. A court would probably decide that you should have foreseen the possible hazard and guarded against it.

The negligent person will not have to pay for the full amount of the damage if s/he can show that the victim was partly responsible for his or her own loss or injury. Where a court finds that two or more people were responsible for the injury, each will be required to pay his or her proportionate share of the total assessed damages.



NUISANCE

Q. WHAT KIND OF ACTIVITY CONSTITUTES A NUISANCE IN LAW?

Nuisance generally refers to the use of land in such a way that it interferes with the use and enjoyment of adjoining land. Interference could occur by such things as noise, smoke, or odour. In an action for nuisance, the court must decide whether the landowner's use of his or her land was "reasonable".

To impose liability, the party suing must demonstrate that s/he has suffered damage as a result of an unreasonable interference. What is unreasonable is usually decided by the court after considering all of the circumstances. If the court finds that a nuisance has occurred or is occurring, it may either award damages to the injured party, or award an injunction. An injunction is an order requiring the offending party to stop the nuisance that s/he has created.

Q. IS AN EMPLOYER RESPONSIBLE FOR THE WRONGFUL ACTIONS OF AN EMPLOYEE?

An employer is responsible for wrongs that the employee commits within the scope of his or her employment. Whether or not the employee was acting within the scope of employment at the time of the act, will depend on the circumstances of each case. The following example will help to illustrate the point.

You send your employee to town for some repairs. On the way to town he negligently injures a pedestrian. You, as employer, could be held liable for the injury, because the employee was acting within the scope of his employment with you. But, if the employee, after picking up the repairs, makes an unauthorized detour to visit a friend, and while driving there injures a pedestrian, you would probably not be responsible, because visiting friends is not within the scope of his employment.

Remember, though, that the negligent employee is also responsible for his own actions, so he too may be sued by the victim.

Q. IS AN OWNER RESPONSIBLE FOR THE ACTIONS OF HIS OR HER ANIMALS?

Before covering this question, we must examine the law in this area. Animals are classified into one or two categories. 1) Animals that are tame by nature, such as dogs, cows and horses; and 2) animals that are wild by nature, such as bears and lions. Before the owner of "tame" animals can be held responsible for their acts, it must be shown that the particular animal in question was dangerous, and that the owner knew or should have known of that. In regards to "wild" animals, they are never considered to be safe, and the owner will automatically be held responsible for that animal's behavior.

It must be noted that the above law has been altered with respect to dogs. The Animal Husbandry Act says that a dog does not get "one free bite" to prove that it is dangerous before the owner can be held responsible. A person who is injured by a dog can now collect damages from the owner without having to show that the owner knew or ought to have known that the dog was dangerous.

The owner of livestock is also automatically liable for any damage caused by the livestock trespassing onto the property of another. The owner of the wandering livestock would have a valid defence to a lawsuit for damages only if the livestock escaped because of the actions of someone else. The owner of livestock would also be liable for any damage that occurred as a result of his or her negligence in allowing their escape onto a road.

Q. WHAT IS THE LAW IN REGARD TO LIABILITY FOR FIRES?

Any person who starts a fire on his or her property must take all reasonable steps to control the fire. If all reasonable steps are not taken and the fire escapes, s/he will be liable for any damage it causes.

If a farmer starts a fire on his or her property and it spreads and causes damage to a neighbour, a court will probably find that farmer liable for the damage. The only way to escape liability would be to show that you were in no way negligent, and that all proper precautions were taken.

OCCUPIER'S LIABILITY

Q. AM I RESPONSIBLE FOR INJURIES SUFFERED BY PEOPLE WHO ARE ON MY PROPERTY?

This answer can be found by looking at the law of "occupier's liability". This branch of the law has to do with situations where a visitor or trespasser is injured by a hazard on the occupier's (owner's or renter's) land. Occupier's liability generally deals with the state of the property which results in an injury, rather than the active conduct of the occupier. It therefore deals with injuries such as those caused by hidden ditches or holes, weak staircases, and slippery sidewalks and floors.

An occupier owes a certain duty of care to all who enter on his or her property. The standard duty of care changes however, depending on the status of the entrant. There are four categories of entrant:

- 1) contractual entrant
- 2) invitee
- 3) licensee
- 4) trespasser

When someone gets injured on your property, you must first determine what kind of "visitor" they were, so you can know what kind of a duty you owed them.

Contractual Entrants

Contractual entrants are visitors to your place who come there under a contract which gave them the right to be there. So, if you hire someone to come and paint your barn, s/he is a contractual entrant because s/he must come onto your land to fulfill the contract.

If the contract which permits the painter to be on your property states what your duty of care is (i.e. what you will be responsible for), it is that term of the contract that will govern the situation.

If the contract is silent with regard to duty of care, there will be an implied term that the property must be as safe as reasonable care can make it.

Invitees

Invitees are visitors to your land who come there with your permission to conduct business. There must be a common business interest between you and the invitee. For example, if you offer to sell your tractor to Jones, and he comes over to your place to look at it, he would be an invitee on your property.

The duty of care owed to an invitee is a complicated one. You must use reasonable care to prevent damage to him from an unusual danger on the property of which you know or ought to know. Therefore you have a duty to inspect your property for unusual dangers, and cover them.

But your duty only extends to those places on your property where the invitee is expected to go, and to the use of those places in a normal way. There may also be a time period which limits the invitation and your liability.

A danger is unusual when it is not usually found in the circumstance. Just because the invitee does not expect the danger, does not mean that it was unusual. It must be unusual in relation to the premises and it must also be unusual for the type of person that the invitee is.

In deciding whether a danger is unusual, a court often balances the seriousness of the injury and the likelihood of its happening, with the cost of reducing the risk. If the injury was probable and is serious, but would have been simple and inexpensive to prevent, a court would be more likely to find that it was caused by an unusual danger.

Licensees

A visitor is a licensee if s/he has permission to be on the premises, but confers no material benefit to you. Social guests would be examples of licensees. Sometimes you give an open invitation to people to drop by whenever they want, and this gives them an "implied license" to be on your property. An injured person who is arguing that s/he had such a license must show that you permitted his or her presence, and not merely tolerated it. It must be noted, though, that young children who enter onto property without express permission may nonetheless be licensees if they were attracted onto the property by some attractive object.

Traditionally, you only owe a duty to licensees to warn them of concealed dangers or traps which you actually knew of. Recent court decisions have made this duty more stringent though. First, courts now may impose liability for both obvious and concealed dangers. Second, sometimes you will be deemed to have been aware of the danger if you had some good reason to be on guard for its presence.

A concealed trap is a danger which is not apparent to the licensee. If a licensee acting as a careful person could not have expected the danger to be there, then it is a concealed danger.

Trespassers

Trespassers are visitors who get onto your land without permission. You must not know that they are on your land, or if you do, you must object.

Traditionally, you were merely under a duty to trespassers not to intentionally or recklessly injure them. But because this rule often caused hardship to innocent trespassers who got injured, the courts have changed the rules. Now you must act with "common humanity in accordance with common sense and civilized behavior". So, now if you know of a hidden danger on your land, you owe a duty to trespassers to warn them of it when you know there is a good chance they will be coming onto your property. Again though, remember that young children who enter onto your property without permission may be found to be licensees and not trespassers, and so you will owe them a higher duty.

The Snowmobile Act says that an occupier of land owes no duty toward a snowmobiler who is a trespasser or licensee except the duty not to create a danger with the intent of doing harm or damage, or do a wilful act with reckless disregard to their presence.

Q. IF A VISITOR OR TRESPASSER IS INJURED WHILE ON MY PROPERTY, ARE THERE ANY DEFENCES I CAN RAISE TO ESCAPE LIABILITY?

There are basically two defences you can raise against an injured visitor who is suing. They are consent and contributory negligence.

If you can show that the visitors or trespassers consented to the risk of danger on your property, you will

probably not be held liable for injury if they hurt themselves. Also, if a visitor or trespasser is negligent with regard to his or her own safety, he or she will lose all or part of a claim for damages against you. Visitors and trespassers must use such care for their own safety as a reasonable and ordinary person would in the same circumstances.

LIL ADNER



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FAMILY LAW

Family Law is a broad area of the law that concerns nearly all of us. It governs what is referred to as "Domestic relations". It concerns such areas as marriage, separation, divorce, division of property, child custody and support. This chapter will attempt to give you a feel for all of the important areas of family law.

Q. WHAT LEGAL REQUIREMENTS MUST BE MET BEFORE A PERSON CAN GET MARRIED?

Certain legal requirements must be met before a man and a woman may get married. They must apply for a marriage license or have a publication of the banns of marriage at a service of worship. Each party must also have a blood test.

If a party to the marriage is over 16, but under 18 years of age, s/he needs the written consent of his or her parents or guardian or a Family Court Judge. A mentally disordered person can be married only if a certificate is obtained from a psychiatrist. The person must be able to understand the duties and responsibilities of marriage.

A person can be legally married by either a religious ceremony or a non-religious one. A non-religious one is performed by a Marriage Commissioner. You can obtain the names of Marriage Commissioners who are authorized to perform marriages in Manitoba from your local County Court office.

Q. WHAT RIGHTS AND OBLIGATIONS DO THE SPOUSES HAVE DURING MARRIAGE?

The Family Maintenance Act provides that both parents have an equal obligation to support and maintain their children until they reach age 18. Spouses are also responsible for supporting and maintaining one another while they are married and living together. This responsibility can be fulfilled by earning an income outside the home, or by running the household. Spouses also have the right to request and receive financial information from each other.

The Child Welfare Act provides that spouses have equal rights with respect to custody and control of their children.

In regards to property, The Marital Property Act says that both spouses have an equal right to the use and enjoyment of family assets. These assets would include the marital home or rented accommodation, even if it is in the name of only one spouse. In a situation where one spouse squanders an asset so that the financial security of the

family is jeopardized, a court may divide the assets between them, even though they are living together. The application for this order may be made to a court within two years of the date that the complaining spouse finds out about the squandering.

Q. WHAT IS THE PURPOSE OF A FORMAL, WRITTEN MARRIAGE CONTRACT?

Marriage contracts between the parties are becoming more and more popular. They are generally subject to the law of contract, even though some of the terms may be contrary to public policy, and so not enforceable. Putting terms into contract form may have a positive effect on the parties' awareness of the responsibilities of marriage, and the desires and expectations of the other partner.

So, what are the positive advantages of a marriage contract, you ask? It allows the spouses to arrange a property division according to their own choosing, which will be binding on either of their deaths. A contract forces the partners to discuss and outline their proposed responsibilities to one another. The contract can also be used to contract out of certain legislation, such as the Dower Act and The Marital Property Act.

The court is not bound by anything in the contract concerning children of the marriage. Although the court may use the contract as a guideline, it may make whatever order it sees fit regarding the children.

A problem with marriage contracts is that on divorce or separation, the court is not strictly bound by them. The tendency is however, that where possible, the contract will be enforced.

Q. WHAT OPTIONS ARE AVAILABLE ON THE BREAKDOWN OF A MARRIAGE?

The spouses can simply separate, or if there are grounds, they can obtain a divorce. Spouses who are separated are still legally married, while a divorce terminates the marriage.

SEPARATION

A separation could occur in the following ways:

- by simply living apart from one another;
- by written agreement;
- by court order.

Q. WHAT IS A SEPARATION AGREEMENT?

So long as a couple is married, the law recognizes a mutual obligation for support and maintenance. A partner who walks out on a marriage can not at the same time end her or his legal responsibilities. So, upon separation, the spouses may agree to enter into a written separation agreement. This is a binding contract, and so the spouses should obtain independent legal advice before signing such an agreement.

A separation agreement would deal with such matters as:

- financial arrangements for the dependent spouse;
- custody of the children;
- maintenance for the children;
- visiting rights;
- division of property;
- release of rights under applicable legislation;
- responsibility for debts;
- the right to live in the marital home.

It must be noted that the maintenance provision in the agreement cannot be enforced through the Maintenance Enforcement Program (to be discussed later) because the contract is not a court order.

A separation agreement will not prevent a later application to a court for a maintenance order. The Family Maintenance Act says that a court may set aside a maintenance provision in an agreement and substitute an order if:

- 1) The spouse who is to provide support by the agreement is in default, or;
- 2) The support that the spouse agreed to provide was inadequate, or;
- 3) The dependent spouse has become a public charge or is in need of public assistance.

Q. WHAT IS A COURT ORDER OF SEPARATION?

A court order of separation is similar to the separation in that it provides an arrangement where the parties agree to live apart, but it is in the form of a court order. An application for this kind of order can be made by either spouse. The application is made under The Family Maintenance Act.

If both spouses agree to the order being granted, the court will do so without hearing any evidence. If the application is contested, the court will hear the evidence of both parties and their witnesses. It is not necessary under this Act to prove fault or establish grounds to obtain an order of separation, and in fact, the spouse who caused the marriage breakdown can make the application. This

differs from the rules of divorce proceedings, as you will see later. The court order of separation, may include provisions regarding support, living arrangements, custody of children, or any other order the court deems proper.

When the court is determining the amount of maintenance to be awarded, it may consider the conduct of a spouse only if it is so extremely unfair and unreasonable that it results in a complete rejection of the marriage. If the circumstance of the spouses change, the Act also allows either one to apply for a review and variation of the order. An application can also be made to add new provisions.

DIVORCE

Divorce is the judicial end of a marriage. It releases the parties from the bonds of matrimony. Divorce in Canada is covered by the Divorce Act, a federal statute. In Canada, parties cannot obtain a divorce by simply consenting to it. They must prove that at least one of the grounds set out in the Act exist.

Q. WHAT ARE THE GROUNDS FOR OBTAINING A DIVORCE?

According to the Divorce Act,

A petition for divorce may be presented to the court by a husband or wife, on the ground that the respondent, since the celebration of the marriage

- (a) has committed adultery;*
- (b) has been guilty of sodomy, bestiality, or rape, or has engaged in a homosexual act;*
- (c) has gone through a form of marriage with another person;*
- (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.*

The above grounds are generally referred to as the "fault grounds", because a matrimonial offence has been committed. There are also other grounds, which occur as a general breakdown of the marriage. Again, to quote the Act,

A petition for divorce may be presented to a court by a husband or wife where the husband and wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances:

*....
(c) the petitioner, for a period of not less than three years immediately preceeding the presentation of the petition, has had no knowledge of or information on the whereabouts of the respondent, and has been unable to locate the respondent;...*

There are other more common grounds, the usual one is that the spouses have been living separate and apart for at least three years, or for at least five years, if the spouse asking for the divorce deserted the other. Gross addiction to alcohol or other narcotic, or five years in **prison** include some of the other grounds for divorce in Canada.

Q. ARE THERE ANY CIRCUMSTANCES OR SITUATIONS WHERE THE COURT WILL NOT GRANT A DIVORCE?

Besides not being able to prove any grounds, there are other circumstances which will bar a divorce. They are briefly, *collusion, connivance and condonation.*

Collusion

Collusion refers to an agreement or conspiracy between the parties to suppress evidence or deceive the court. For example, an agreement where the parties agree that one will go out and commit adultery so they can get a divorce would probably be collusion. Collusion is an absolute bar to divorce on all grounds, but it is not forever. If the court bars one petition, you may present a new one if you have new grounds later.

Connivance

Connivance is the act of allowing the commission of a matrimonial offence, knowingly. It only applies to the "fault grounds". An example of connivance would be if the petitioner knows his or her spouse is about to commit adultery, and says, "go ahead, I don't care".

Condonation

Condonation refers to the forgiveness of the innocent spouse for a matrimonial offence committed by the other. Condonation must be made with full knowledge of all the circumstances of the offence. Taking the spouse back and forgiving him or her would be condonation, but returning to living together for less than 90 days with the intention of reconciliation is not condonation.

Condonation only applies to the "fault grounds" and if found may result in the dismissal of the petition.

Q. WILL A DIVORCE COURT DEAL WITH CUSTODY AND MAINTENANCE?

Yes, the court will also resolve the issues of custody and maintenance. The Family Maintenance Act is the governing legislation in the case of separation, but in a divorce action, The Divorce Act applies. The main difference between these two is that in separation actions fault is not considered when determining amount of maintenance, but with the Divorce Act, fault or conduct is important. The court will also look at the spouses' needs and financial circumstances.

A parent is obliged to provide maintenance for his or her children until they are 16 years old, and for a longer period of time if the child is unable to support him or herself. For example, a child would be unable to support him or herself if physically or mentally disabled, or still furthering his or her education. There is no maximum age beyond which a child automatically ceases to be entitled to maintenance.

To determine who should have custody of the children, the court will look at the conduct of the spouses, the need and financial circumstances of the spouses, and the best interests of the children.

It should also be noted that one divorce proceedings have been started, either party may apply for an interim order of maintenance, custody, or whatever is required.

Q. WHAT HAPPENS AFTER A DECREE OF DIVORCE HAS BEEN GRANTED BY THE COURT?

If grounds have been proved, and there are no bars to the divorce, the court will issue a *decree nisi*. It may include provisions for maintenance or support, and if it does, any previous order (separation order) will stop being effective. If the court doesn't deal with these matters, the provisions in the separation order will continue.

Q. HOW SOON AFTER THE DIVORCE MAY THE PARTIES REMARRY?

The parties (they are no longer spouses) may only remarry after a decree of divorce has been made absolute. This happens three months after the granting of the decree nisi, and application has been made to the court to "finalize" it. The court in these circumstances, will issue a *decree absolute*.

Q. CAN A DIVORCE ORDER BE VARIED?

If after the divorce order has been granted, the circumstances of the parties change, an application can be made to have the order varied. The variations will usually deal with maintenance, custody, or visiting privileges.

Q. WHO DOES MARITAL PROPERTY BELONG TO?

The Marital Property Act recognizes that "marriage is an institution of shared responsibilities and obligations between parties recognized as enjoying equal rights". The Act further says that there is a presumption "on the breakdown of the marriage, of equal sharing of the commercial and family assets" acquired by the parties during the marriage. So, upon breakdown of the marriage, the court starts from the position that all assets acquired during the marriage will be shared equally between the spouses.

Q. TO WHOM AND WHAT ASSETS DOES THE MARITAL PROPERTY ACT APPLY?

The Act applies to all spouses, whether married in Manitoba or elsewhere, if: 1) Manitoba has been the habitual residence of both spouses; 2) each of the spouses now has a different habitual residence, but Manitoba was the last common habitual residence; or 3) each of the spouses has a different habitual residence and the spouses have not established a common habitual residence since their marriage, but Manitoba was the common habitual residence at the time of the marriage. The Act does not apply to spouses who separated before May 6, 1977, unless they have lived together for a period of more than 90 days since May 6, 1977.

The Act does not apply to any asset acquired by a spouse

- while married to or living separate and apart from the other spouse,
- while married to a former spouse,
- while unmarried

The Act does apply to assets acquired prior to but in specific contemplation of marriage. If assets acquired before marriage have increased or decreased in value during the marriage, this change will be taken into account in a division of assets following marriage breakdown. Assets located outside of Manitoba are not shareable, but their value will be taken into account in determining how the asset should be divided.

The proceeds of any award of damages, settlement or an insurance claim received by one spouse for a personal injury is not shareable. Gifts exchanged between spouses are shareable assets, but gifts or inheritances from a third person to one of the spouses are not shareable, unless it was intended to be a gift to both.

Q. WHAT CATEGORIES OF ASSETS ARE THERE UNDER THE MARITAL PROPERTY ACT?

The Act classifies shareable assets into two categories: 1) family assets; and 2) commercial assets.

A family asset refers to any asset owned by one or both spouses and used for shelter, transportation or recreational purposes. Examples of family assets would be the marital home, the family car, furniture and appliances, savings accounts, etc. Family assets are generally divided equally between the spouses.

A commercial asset is any asset that is not a family asset, such as an interest in a business, or investments and pension schemes. Each spouse has the right to an equal share of commercial assets at the time of marriage breakdown, but the court has the discretion to vary an equal division where it would be clearly an unfair division.

Q. WHAT TYPE OF ASSET IS A FARM?

The unique nature of a farm makes it both a family asset and a commercial asset. The farm house and that part of the farm land necessary for the use and enjoyment of it, is considered to be a marital home, and is therefore a family asset. The value of it will usually be divided equally on marriage breakdown

The remainder of farm property is a commercial asset. Therefore, both spouses have the right to an equal division subject to the court's discretion to vary this where it would be unfair.

It must be remembered that if the farm was purchased before the marriage it is not a shareable asset, unless it was purchased in contemplation of marriage. But, any increase or decrease in the value of the farm after the date of marriage must be taken into account. A farm which was acquired by inheritance or a gift to one of the spouses is not shareable, nor is the increase or decrease in value in this case.

Rights under The Marital Property Act are in addition to those under The Dower Act.

Q. WHEN DOES THE RIGHT TO APPLY FOR AN EQUAL DIVISION OF ASSETS ARISE?

Under The Marital Property Act, spouses have the right to an equal division of property on separation, (any of the three types discussed earlier), divorce, or where one spouse has committed an act squandering assets.

THE FAMILY MAINTENANCE ACT

Q. WHAT DOES THIS ACT SAY ABOUT MAINTENANCE OF THE CHILDREN OF THE MARRIAGE?

Under The Family Maintenance Act both parents have a responsibility to maintain children under the age of 18.

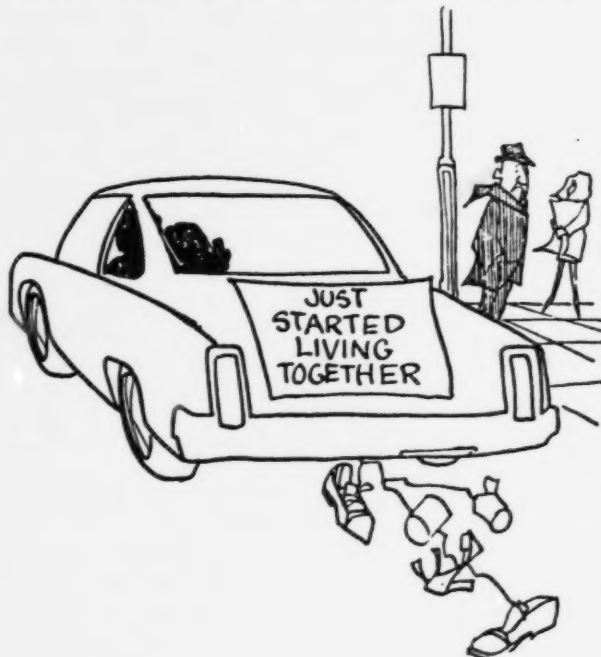
This responsibility arises even where a parent does not have custody or visiting rights, and even where parents have remarried.

A step-parent also has an obligation to support the children of his or her new spouse while the children are in their custody, but this obligation is secondary to that of the natural parents.

In determining the amount of maintenance to support the children, a court will consider the cost of housing and living expenses, the cost of providing a stable environment and the financial circumstances of the parents.

Q. CAN I STAY IN OUR HOUSE ALONE EVEN IF THE HOUSE IS NOT IN MY NAME?

Another important provision of The Family Maintenance Act allows either spouse to apply for a court order allowing him or her to live in the marital home alone, even if the other spouse is a joint or sole owner of the home. The court may also postpone any sale or other disposition of the home where such an order has been made.



Q. WHAT RIGHTS AND OBLIGATIONS ARE THERE IN UNMARRIED RELATIONSHIPS?

In situations where a man and a woman live together as married, certain rights and responsibilities arise.

This type of relationship is usually referred to as a "commonlaw" relationship. If the commonlaw spouse has lived with the other for over a year, he or she can apply to a court for an order keeping the other from entering the premises or annoying him or her.

If the commonlaw spouses have been living together for over a year and they have a child, the "spouses" have the same rights regarding maintenance and occupancy of the family home as legally married persons.

The provisions of The Marital Property Act do not apply to unmarried couples where the property in question is held in the name of one person only. If the property is in both names however, there will be no problem with division of it on the breakdown of the relationship.

In a recent decision of the Supreme Court of Canada (the highest court in the land) a commonlaw "wife" was found to be entitled to a portion of a farm held only in the name of the "husband". The wife contributed to the acquisition of the farm assets in the early years of their relationship by using her money to pay for the household expenses, allowing the husband to save his money. A farm was later purchased with that money. After the farm was purchased, the wife contributed money for repairs, and also contributed the necessary labour to the new enterprise. Because of these contributions, the court held that an equal division of the farm assets was appropriate, so as to prevent the unjust enrichment of the husband. This was a surprising decision, and shows a small change in the court's thinking in recent years.

If the parents of a child are not living together in a commonlaw relationship, the mother is the guardian of the child unless a court orders otherwise. The court will only make such an order if the mother is grossly unfit as a parent. The father of the child does have a right to apply for custody of the child, and the court will consider the best interests of the child in making its decision. Both natural parents are responsible for maintaining the child until s/he is 18 years old, but for this responsibility to be effective, the father must know he is the father.

Q. WHAT IS THE LAW IN REGARD TO CHILD NEGLECT OR ABUSE?

If you have reason to believe a child is suffering from neglect or abuse, you must report it to a child-caring agency immediately. The agency will then have the right to enter the home to investigate, and may take any steps necessary to protect the child, including removing him or her from the home. This can be done without the consent of the parents or guardian. The agency may then apply for an order of guardianship, and if the parent wishes, he or she has the opportunity to show why an order of guardianship is not necessary.

Q. ARE CANADA PENSION PLAN BENEFITS SHARED IN ANY WAY AT THE END OF A MARRIAGE?

Pension credits earned by one or both spouses under the Canada Pension Plan during the marriage may be divided equally between them on divorce. This arrangement protects the spouse who does not work outside the home. To be eligible for a division of pension credits, the following conditions must be met:

- the marriage must have legally ended on or after January 1, 1978;
 - the spouses must have lived together for at least 36 months in a row during the marriage;
- the application for the sharing must have been made within three years of the legal end of the marriage.

Q. ASSUMING THAT A MAINTENANCE ORDER HAS BEEN MADE, HOW CAN THE RECIPIENT SPOUSE INSURE THAT HE OR SHE WILL RECEIVE THE MONEY?

In Manitoba, maintenance orders can be enforced through the Maintenance Enforcement Program. This program is operated by the department of the Attorney-General. Maintenance orders enrolled in the program are monitored by computer. The computer will automatically take note of any default in payment of maintenance, and enforcement proceedings are immediately started on behalf of the recipient. Most court orders made after January 1, 1980 are automatically enrolled in this program, and orders made before that date can be enrolled by filing the appropriate form with the court.

Manitoba has also entered into an agreement with other provinces and countries to enforce orders of maintenance where the defaulting spouse has moved out of the jurisdiction.



"Poor Ralph.
Apparently he's
had a lot of dif-
ficulty making his
alimony payments."

Q. IF A CUSTODY ORDER HAS BEEN GRANTED, WHAT IS THERE TO PREVENT THE CHILD FROM BEING TAKEN TO ANOTHER PROVINCE OR JURISDICTION?

If the court has granted a custody order to one parent, and the other removes the child in violation of this order, the order can be enforced by immediately contacting the police and a lawyer, if the child is still in the province.

If the child is taken into another province, The Extraprovincial Custody Orders Enforcement Act enacted by most provinces allows for the enforcement of a Manitoba order in those provinces. The Divorce Act also contains provisions which allow for the enforcement of custody orders throughout Canada.

Where custody or maintenance orders are made after divorce proceedings, the Divorce Act says that the order may be registered in any superior court in Canada. In this way, such an order can be enforced in any province.

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BANKRUPTCY

If a person is unable to pay his or her debts when they become due, and the creditor insists upon payment, the law of bankruptcy enters to govern the situation. Bankruptcy in Canada is covered by a Federal statute - the Bankruptcy Act. This Act allows an honest but unfortunate debtor to obtain a discharge from his or her debts. The Act also provides a method where an insolvent debtor turns over his or her property to a trustee for distribution among creditors.

Bankruptcy should be considered only as a last resort however, it is not an "easy way" to get out of liabilities. You should only consider bankruptcy if there is no possible way in which to pay your debts, and your liabilities exceed your assets.

The discussion in this chapter can at best be only brief and superficial because the topic can be extremely complex. The importance of getting competent advice cannot be over-emphasized.

It goes without saying that your main objective must be to avoid getting into a situation where bankruptcy is the only way out.

Q. WHAT CAN BE DONE TO AVOID THE NECESSITY OF DECLARING BANKRUPTCY?

It is important to keep clear and up-to-date records, because it will assist you in making better management decisions. These records will ehlp you to calculate what sort of a debt load you can handle. (But don't forget to also consider the country's economic conditions, and those of your particular segment of the industry.)

You should also take into consideration and make provision for circumstances beyind your control. For example, ask yourself the following questions. "What would happen if my crop was destroyed by hail, or my barn was lost due to fire: Should I have insurance to protect myself? What would happen if I became ill or was injured at a busy time of the year? Should we obtain some sort of Worker's Compensation from the province? a farm organization? an insurance company?" The point is - contemplate possible problems and have a plan ready. Don't get caught with your "pants down".

If things do get to the point where you are unable to make your payments as they become due, all may not be lost. In this situation it is important to act fast; the problem will not go away on its own and may get worse. HERE YOU SHOULD SEEK EXPERT ADVICE, for example, a lawyer, accountant, or farm management specialist. It may be possible to work out a plan that will satisfy your creditors. You might be able to get your creditor to extend the time for repayment, or be able to consolidate your loans, or do one of many things which will depend on the circumstances. The same advice would apply if you were to receive a legal document demanding payment on an overdue account.

Q.. WHAT IS THE DIFFERENCE BETWEEN INSOLVENCY AND BANKRUPTCY?

As a person's financial position deteriorates, s/he may become insolvent. That is, you are unable to meet your debts as they become due, or your liabilities exceed your assets. An insolvent person is a person who, although not bankrupt, has liabilities of at least \$1,000, and is either unable to meet his or her obligations as they become due, has ceased paying current obligations in the ordinary course of business, or does not have sufficient property to generate enough money to pay debts.

A bankrupt is a person who has made an "assignment" or has had a "receiving order" made against him or her. (These terms will be explained shortly). So, bankruptcy simply refers to the state of being bankrupt, or the fact of becoming bankrupt.

Therefore, the term "insolvency" describes a financial condition, whereas the term "bankruptcy" describes a legal condition. It is possible for a person to be insolvent, but not yet bankrupt.

Q. HOW IS BANKRUPTCY GOVERNED AND WHAT IS ITS PURPOSE?

Bankruptcy is governed by the Bankruptcy Act - a federal statute. The act is intended to perform three tasks. They are:

- 1) To establish a uniform practice in bankruptct proceedings throughout the country at the minimum expense possible;
- 2) To provide for a fair distribution of assets among the debtor's creditors;
- 3) To provide for the release of an honest but unfortunate debtor from her or his obligations, thus permitting him or her to resume business activities with a clean slate.

Q. TO WHOM DOES THE BANKRUPTCY ACT APPLY?

For the most part, the act applies to corporations and individuals that carry on business in Canada. There are three methods of procedure available if that person becomes insolvent, and they will be explained next. It must be noted however, that the provisions involving "compulsory receiving order" (in the next section) do not apply to individuals involved solely in farming. These individuals make a "voluntary assignment" or a "proposal" under the act. Remember, the word "individual" refers to a natural person only, while the word "person" could mean a corporation.

Q. WHAT ARE THE METHODS OF PROCEDURE IN BANKRUPTCY?

There are three methods of procedure. Each will be discussed briefly.

I. COMPULSORY RECEIVING ORDER

A creditor can petition for the bankruptcy of his or her debtor if the debt is at least \$1000. A group of creditors can petition collectively if the total amount owed to them is at least \$1000. To be successful in their petition, they must show the court that the debtor has committed an act of bankruptcy (to be discussed later), within the last six months. If the creditor was successful, the court will issue a compulsory receiving order. This order authorizes a transfer of the bankrupt debtor's property to a licensed trustee in bankruptcy, for realization and distribution to the creditors. But don't forget that this does not apply to individuals engaged solely in farming.

II. ASSIGNMENT

A debtor can voluntarily start bankruptcy proceedings by applying to have a licensed trustee in bankruptcy appointed. The trustee will then proceed in the same way as if he or she had been appointed by a compulsory receiving order.

Any insolvent person can make an assignment. It must be remembered that this is the method used by individual farmers. You would voluntarily start these proceedings, rather than waiting for your creditors to sue you.

III. PROPOSAL

An insolvent person can make a proposal to all of his or her creditors in the hope of avoiding bankruptcy. If the proposals are accepted, an arrangement can usually be reached as an alternative to bankruptcy proceedings. But, the debtor must present this proposal to the creditors via a licensed trustee in bankruptcy.

If the creditors approve of the scheme, the trustee must obtain the court's approval. Once the court approves the scheme, all creditors are bound. Approval by both the court and the creditors operates to transfer the assets back to the debtor.

Q. WHAT ARE "ACTS OF BANKRUPTCY"?

The Bankruptcy Act sets out the various types of conduct that are "acts of bankruptcy" by the debtor. Briefly, they are:

- 1) the assignment of property to a trustee for the benefit of creditors;
- 2) the fraudulent transfer of assets to a person other than a trustee, that is, a transfer made to prevent a creditor from getting the property.
- 3) the creation of a fraudulent preference, that is, the settling of a claim with one creditor, in preference to that of another;
- 4) absconding in an attempt to defeat or delay creditors;
- 5) the failure to redeem goods siezed under an execution order against the debtor, that is, the failure to pay the arrears on property the seller has repossessed;

- 6) the presentation at a meeting of creditors of a statement of assets and liabilities that shows the debtor is insolvent, or the written admission of the debtor that she or he is unable to pay his or her liabilities;
- 7) the attempt to remove or hide property;
- 8) giving notice to the creditor that the debtor is suspending payment of debts;
- 9) the default in a proposal which has been previously accepted by the creditors;
- 10) the failure to meet liabilities as they become due.

Q. WHAT HAPPENS AFTER THE DEBTOR'S ASSETS HAVE BEEN TRANSFERRED TO THE TRUSTEE IN BANKRUPTCY?

The trustee will take possession of the assets and records of the bankrupt debtor. In a sense, the trustee acts as a temporary manager. He or she will also recover all property which should form part of the debtor's assets under the Bankruptcy Act. A trustee can generally recover any property that has been transferred by a bankrupt within a year before the bankruptcy, and in some cases as many as five years before the bankruptcy. Money paid by the debtor within six months of the bankruptcy may also be recovered. Remember though, that these provisions of the act are intended to nullify transactions that would defeat the claims of legitimate creditors, and do not invalidate bona fide transactions made in the normal course of business.

Before the trustee can make payments to the general body of creditors, he or she must settle with the "secured creditors" first. A secured creditor is one who holds security for the debt, such as a mortgage or a lien. It must be noted that in many business bankruptcies the claims of the secured creditors will take up all of the assets available for distribution. If there is any money left after these secured claims have been settled, the trustee will pay the unsecured creditors rateably, according to the amount of money left.

Preferred creditors are defined by the act, and they are paid next. Preferred creditors include

- funeral expenses
- expenses and claims of the trustee
- wages of employees
- municipal taxes
- arrears in rent
- claims of injured employees



Q WHAT ARE THE DUTIES OF THE BANKRUPT DEBTOR?

After there has been a compulsory receiving order or an assignment, the debtor must present himself or herself to the official receiver in order to explain his or her conduct, the cause of the bankruptcy, and the disposition of the property. A sworn statement of affairs, names and addresses of creditors and a list of the security held by them must be submitted to the trustee. The bankrupt must then attend a meeting of creditors and give them any information they require. The debtor's property must be turned over to the trustee and the debtor must cooperate with the trustee in every way.

If a debtor is guilty of any offence set out in the act, he or she is liable to imprisonment. These offences include

- the fraudulent disposition of property before or after bankruptcy,
- failure to perform any of the above duties,
- giving a false answer at any of the above inquiries,
- altering or destroying records,
- obtaining credit or property by false representation before or after bankruptcy.

Q. HOW IS A BANKRUPT DEBTOR DISCHARGED?

The discharge of a bankrupt debtor is an official act of the court. It generally cancels the unpaid portion of a debtor's debt so that he or she now has a clean slate. In deciding whether or not a debtor should be discharged, the court will examine the trustee's report. Some of the following situations can result in the court refusing to discharge a bankrupt:

- 1) assets are insufficient to pay creditors at least fifty cents on the dollar;
- 2) debtor failed to keep adequate records;
- 3) debtor continued to trade after becoming aware that he or she was bankrupt;
- 4) debtor failed to account for loss or deficiency of assets;
- 5) debtor caused the bankruptcy by rash speculation or extravagant living;
- 6) debtor gave undue preference to a creditor;
- 7) debtor is guilty of a bankruptcy offence;
- 8) debtor has failed to perform any required duties.

It must be noted that until a bankrupt debtor obtains a discharge, he or she is liable to a fine or imprisonment if:

- s/he obtains credit of \$500 or more for a purpose other than to obtain necessities for self or family without disclosing that s/he is an undischarged bankrupt,
- s/he recommences business without disclosing that s/he is an undischarged bankrupt.

Q. WHAT ARE THE ORDERLY PAYMENT OF DEBT PROVISIONS IN THE ACT?

The Orderly Payment of Debt provisions are a simple and inexpensive procedure for debtors. You simply apply to the court by filling out an affidavit (see sample) for a consolidation order. If accepted, the total indebtedness and the amount you can afford to pay are calculated. You then make periodic payments to the court, and it will distribute your money to your creditors on a percentage basis. So long as you make these regular payments your creditors can take no further action against you, but your



No.

Orderly Payment of Debts

FORM 1

(section 175 (2))

In the County Court of

AFFIDAVIT

I, ... of in the Province of
Manitoba make oath and say that:

1. The following is a complete and full statement of all my assets and liabilities and of my personal responsibilities.

2. All of my creditors and the amounts owing by me to them are as follows:

Name	Address	Relationship to Debtor	Amount	Date Debt Incurred
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				

3. My creditors hold security as follows:

Name of Creditor	Nature and Particulars of Security
.....	
.....	
.....	

4. I have an interest in the following described property:

Description	Value	Encumbrances
.....	\$	\$
.....	\$	\$
.....	\$	\$

5. My total income from all sources amounts to \$, being

6. My take home income is \$ after the following deductions

7. My business or occupation is and I am employed by
 whose address is

8. My age is

9. My marital status is

10. The income of my spouse from all sources amounts to \$, being

11. The take home income of my spouse is \$ after the following deductions:

12. The business or occupation of my spouse is that of and (he) or (she) is
 employed by whose address is

13. I have been unemployed during the past 12 months for a period of
 because of
 (state reason for unemployment)

14. The following persons are dependent upon me:

Name	Age	Relationship	Extent of Dependency
.....			
.....			
.....			
.....			
.....			
.....			
.....			

15. The monthly living expenses for myself and my dependants are:

Food	\$	Transportation	\$
Rent	\$	Insurance	\$
Utilities	\$	Incidentals	\$
Clothing	\$	Other	\$
Drugs	\$	Total	\$

Sworn before me at in
 the Province of Manitoba this day of

..... A. D. 19

Debtor's Signature.

debt to them becomes a court ordered judgment debt.

Q. CAN A CREDITOR HIRE A COLLECTION AGENCY TO COLLECT ITS DEBTS?

A lender or seller can hire a collection agency for the collection of debts. Every collection agency must be registered with the Consumer's Bureau. Collection practices are governed by The Consumer Protection Act. The act provides that no person employed by a collection agency may

- 1) collect from a debtor a greater amount than that owed;
- 2) collect his or her fees from the debtor;
- 3) threaten a debtor with any legal action for which he or she has no legal authority;
- 4) make telephone calls or personal calls so often that it constitutes harrassment;
- 5) seize any goods of the debtor or of his or her family unless they are present at the time of the removal;
- 6) seize any goods other than those mortgaged;
- 7) demand payment or seize goods from a debtor on a Sunday or holiday. On any other day the collector may only call between the hours of 7:00 a.m. and 9:00 p.m.
- 8) give any false information to any person or agency that may be detrimental to a debtor or his or her spouse.

Where a collection agent charges a debtor any amount the debtor did not have to pay, the debtor may

- 1) if the amount has been paid, recover from the collector three times the amount paid;
- 2) if the amount has not yet been paid, three times the amount paid less the amount owed.

Where a collection agent wrongfully seizes goods, the debtor may take the goods back and recover the costs involved in retaking possession.



*Arnold! Did you
miss a payment on the car?*

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W I L L S

A will is a document directing the disposition of your property at death. For it to be valid certain legal requirements must be met, but there are factors other than the validity of your will which govern where your property goes. It can depend upon your marital status, how the property in question is owned, and the applicability of related legislation.

A woman who makes a will is called a testatrix, and if a man makes a will he is called a testator. If you die without a will or your attempt to make a will failed because you did not observe the formalities prescribed by law, you are said to have died "intestate" (rather than "testate"). Sometimes a person makes a valid will but fails to include all of his or her property in it; in such a case s/he is said to die "partially intestate", for his or her will has effectively disposed of only part of the property.

In Manitoba the law recognizes two kinds of wills:

- 1) "witnessed wills" drawn up in accordance with the requirements of The Wills Act and
- 2) "holograph wills" which are wills wholly handwritten by the testator/testatrix and signed by him or her.

A will only takes effect upon your death. Until your death you can do as you want with your property. A will is also revokable, so that you can change your mind after making a will. So long as you live your property rights remain unchanged by a will and your prospective beneficiaries can only hope that you will do nothing to deprive them of their anticipated benefits. If you have any debts outstanding at your death your property must be used to satisfy your creditor before anyone else will be allowed to claim a benefit under your will.

Q. WHY SHOULD I BOTHER TO MAKE A WILL?

There is no law that requires you to make a will. You should have a will if you wish your family and loved ones to avoid unseemly squabbling over your property and/or costly legal procedures. A will can put your mind at rest for it assures that your possessions will go to the persons you wish to have them.

If a person dies intestate (without a will), The Devolution of Estates Act will deal with the situation. The person's estate will then be divided according to the provisions of the Act. The Act provides that for estates worth less than \$50,000., everything goes to the widow or widower. If the estate is worth more than \$50,000., the widow or widower will get the first \$50,000. and one-half of the remainder. What is left will be divided equally between the children of the deceased. If there are no children, then the widow or widower

takes everything. If there is no surviving spouse then the entire estate will be divided equally between the children. The Act also provides a distribution scheme for cases in which there is neither a surviving spouse or children. The order of succession would be as follows: The parents of the deceased and if they are not alive, then any of the deceased's brothers and sisters. If none of these people are available, the property will go to the deceased's closest next of kin, in the order as set out in the Act.

The provisions of The Dower Act also apply to wills. This prevents a person from disinheriting his or her spouse. There are several qualifications to the effect of The Devolution of Estates Act. The Dower Act gives the spouse of the deceased a right to the family home for his or her life, and one-half of the deceased's estate.

Q. DOES THE DOWER ACT ALWAYS APPLY?

There are two situations where a surviving spouse may not be able to take advantage of the provisions of The Dower Act. The first is where that spouse, in return for valuable consideration, contracted out of his or her rights under The Dower Act (see chapter on Contract Law). The second situation occurs when a spouse at the time of the death of his or her spouse was not living with the deceased spouse. If the surviving spouse deserted his or her spouse without good cause (i.e. cruelty), then he or she will probably not be entitled to Dower rights. The only way the surviving spouse could get his or her Dower rights reinstated is by applying for a court order.

It is up to the surviving spouse to elect whether or not he or she wants to take under the will or under The Dower Act. If he or she chooses The Dower Act, then that spouse receives one-half of the estate. If the will gave that spouse a lump sum of \$150,000. plus an annual income of \$10,000., or an annual income of at least \$15,000., the spouse cannot apply under The Dower Act. As well, no matter what the will says, the surviving spouse has a right to the family home for the rest of their life.

Q. WHAT IF A WILL DOES NOT ADEQUATELY PROVIDE FOR A FAMILY MEMBER?

Whether the estate is governed by The Devolution of Estates Act or a will, a spouse or child can apply under The Testator's Family Maintenance Act to have the judge vary the will or the provisions of The Devolution of Estates Act. If the deceased has failed in his or her will to provide adequately for a spouse or grown child, or the deceased has died intestate and it is felt that the provisions of The Devolution of Estates Act do not adequately provide for a dependent due to some special circumstances (e.g. illness, handicap, educational needs), a judge may vary the apportionment. But it must be noted that any adjustments that are made cannot have the effect of lessening what the surviving spouse would get under The Dower Act.



*"And so, being of sound mind and understanding,
I spent every damn penny I had before I died."*

Q. WHAT HAPPENS IF BOTH SPOUSES SHOULD DIE AT THE SAME TIME?

If both parents should die at the same time and leave no will, their children could be left in a bad situation. Children under 18 cannot touch the inheritance, so a guardian or the Public Trustee (if no one else is interested in the job) appointed by the court will allocate the money for their upkeep from frozen assets of their parent's estate. Often two guardians are appointed; guardian of the estate, and guardian of the children. But it must be noted that an executor named in a will has more rights than an appointed guardian or the Public Trustee, and thus may be better able to serve the needs of the children.

If both spouses die together and they have no will, the following problem could occur. If it can't be determined which spouse dies first, the law assumes that the older spouse died first. So the estate of the older spouse will pass to the younger spouse, and then to the next of kin of the younger spouse.

The possible effects of this can be seen in the following example. John Jones, Jr. (age 24) marries Bertha Brown (age 22). John Jones, Sr., had given his son a farm and all of the required machinery and equipment to farm the land, before the marriage, so that his son would be able to support his new wife. Several months

after the marriage, John and Bertha went on a holiday. The holiday was a resounding success, but things turned sour on the trip home. Their plane crashed, and there were no survivors.

As luck would have it, neither had a will. Since it could not be determined who died first, it was deemed that John died first. So Bertha inherited the farm, etc., and it was then passed on to Bertha's next of kin (a family of welfare bums living in the city). John Jones, Sr., got nothing. His generosity had all been for naught.

It must be noted that the same result would occur even if John and Bertha had had wills, but had not included a survivorship clause. In such a clause, John would leave all of his property to his wife, so long as she survived him by 30 days (or any other chosen time period). He would then stipulate what would happen to his property if his wife did not survive him by the required period of time.

Q. WHAT IF THE DECEASED IS SINGLE?

Even if you are single and have no children you should have a will. Without one, your estate is divided between your parents if they are still alive and your brothers and/or sisters if they are still alive. You may have other relatives or close personal friends who you may wish to share in your estate. If this is so, you must state it in a will.

If you die without a will and you have no blood relatives, your entire estates goes to the province in which you live. Relatives by marriage are entitled to nothing, no matter how close they have been to you during your life. Common law spouses and illegitimate children are in a particularly vulnerable position, and therefore a will setting out who is to get what ensures that loved ones are provided for regardless of the degree of kinship.

Q. WHAT ARE THE REQUIREMENTS OF MAKING A WILL?

There are certain legal requirements which your will must comply with in order to be valid. In particular your will must be intended to have a disposing effect and must be duly executed as required by the Wills Act.

The court must be convinced that the will submitted to Probate (discussed later) was actually your "will", that is, you intended that particular document to have disposing effect. It is conceivable that you may not have intended something you have written and signed to be your will, such that the document was intended merely as a guide for a will or a draft for a future will. A will which does not express the real or true intention of the testator will be set aside as ineffective. Any hint of duress or undue influence will render a document ineffective as a will.

To be effective as a testamentary instrument your will must be executed as required by The Wills Act. The following general requirements must be met:

- 1) you must be at least 18 years old, or married, or a member of a military force on active duty or a sailor at sea;
- 2) your will must be in writing (as opposed to an oral will);
- 3) the will must be witnessed by at least two witnesses in a special manner prescribed by The Wills Act; and
- 4) the will must be signed by the maker.

However, there are exceptions to this rule. No witnesses are required for the will of a soldier on active duty, a sailor at sea, or a holograph will (but it must be entirely in your own handwriting and signed by yourself). It would also be advisable to date the will, because when the will is probated, the date that the will was made must be established.

It must also be noted that a gift to a witness or to the spouse of a witness to a will is void. Also subsequent marriage automatically revokes a will unless there is a declaration in the will that it is made in contemplation of the marriage. In the case of divorce, unless there is a declaration in the will that it was made in contemplation of the dissolution of the marriage, the ex-spouse cannot benefit under the will.

Therefore, to comply with The Wills Act a formal (as opposed to a holograph) duly executed will:

- 1) must be in writing;
- 2) must be signed by you, the testator, or by some other person in your presence and by your direction;
- 3) you, the testator, must make your signature or acknowledge the signature in the presence of two or more witnesses who are present at the same time; and
- 4) the witnesses (two or more) must then attest and subscribe the will in the presence of the testator.

These requirements must be strictly followed.

Q. WHAT SHOULD BE INCLUDED IN MY WILL?

What you wish to include in your will is very much a personal matter. It can be very detailed and drawn up by a lawyer or it can be a

brief holograph will. It will depend on your individual circumstances. Most people find that when they begin to compile a list of their assets, their net worth is greater than imagined.

For the average married couple, with children, drawing up a will tends to be a fairly complex matter since it should deal with major problems such as the joint death of both husband and wife, the administration of assets for the benefit of minors, and the effect of both federal and provincial tax legislation, among other. In order to deal with these problems and before preparing a will (or wills) your lawyer(s) must spend some time with you and your spouse reviewing your family situation and financial position, in order to ascertain your wishes and how best to implement them.

Q. WHAT INFORMATION DO LAWYERS REQUIRE BEFORE THEY CAN DRAW UP A WILL?

There is certain basic information which your lawyer will require before he can draw up your will. The following information will be required:

- 1) place of birth, citizenship and domicile;
- 2) marital status, that is, are you single, married, divorced, separated, widowed, and relevant details, including ante-nuptial agreements, separation agreements, or applicable statutory community of property regime which could restrict your testamentary freedom;
- 3) list of dependents;
- 4) list of real property including the legal description of the land, location, when purchased, purchase price, V-day value, holding of title (sole ownership, tenancy in common, or joint tenancy);
- 5) list of personal property, including such things as cars, trailers, campers, books, heirlooms, jewelry, stocks and bonds, bank accounts, pensions and annuities, details of survivor benefits, business interests, mortgage interest, monies owing, debts that have been forgiven, leasehold interests, and farm machinery and equipment;
- 6) list of life insurance policies, including all policies on your life and policies in which you are named as beneficiary on the lives of others;
- 7) names of personal representative(s) and/or trustee(s);
- 8) list of special trusts or provisions, e.g. for handicapped beneficiaries; and
- 9) provisions for the guardianship of children including remuneration and other provisions.

You may also want to include instructions concerning your funeral, but the will may not be read until after your funeral.

Q. IS THERE A WAY IN WHICH THE RESULTS OF THE SIMULTANEOUS DEATH OF BOTH SPOUSES CAN BE OVERCOME?

A will should include a survivorship clause. Usually a couple without children make wills leaving all assets to the surviving spouse in the event of death. As mentioned earlier, it is a rule of law in Manitoba that where spouses die together and it is medically impossible to determine who died first, the older person is deemed to have died first. This would usually be the husband. It is therefore possible that this rule of law will have results which the couple did not intend and would not have wanted.

Since the law assumes that the wife outlived her husband (assuming of course that she is younger than her husband), all of the assets of his estate pass to the wife and form part of her estate which is then passed on to her parents or next of kin according to the laws of inheritance. This also means that the husband's property goes to his wife's blood relatives, when he most likely would have wished it to go to his own family.

These unfortunate results can be avoided by a will which includes a "survivorship clause". This clause states who is to have your property if your spouse does not survive you. For example, the clause could state that your spouse is to share in your estate only if he or she survives you by thirty days, and if he or she does not, who then is to have the property (thirty days is generally the length of time selected, but there is no magic in this number).

Q. HOW CAN I REVOKE OR ALTER MY WILL?

Getting married automatically revokes a will, unless it contains a clause stating that the will was made in anticipation of marriage. The making of a new will revokes a previous will. If you physically destroy your will intentionally, you have revoked it. But the accidental destruction of a will does not revoke it.

Unless a will has been intentionally destroyed, replaced by a newer one, or revoked by marriage, it remains a valid legal document.

It is probably a good idea to re-examine your will every five years, as changing circumstances, such as new tax law, might influence the way in which you wish to dispose of the estate. For example, wills written prior to 1971 will not have considered the implications of capital gains taxation.

A will could be altered by revoking an earlier will, and writing an entirely new one. But, changes in a will can be made by the

addition of a "codicil". A codicil is a supplement to a will and it contains any addition, or alteration to the will, or an explanation of the revocation of anything contained in the will.

Q. IS IT POSSIBLE TO HAVE A CONDITIONAL WILL?

A will may be conditional, that is, intended to have legal effect only on the happening of some event or a testator may intend a will to be effective only during a temporary state of affairs, such as a journey or a period of military service. Probate of a conditional will will be refused if the temporary state of affairs has passed.

Q. WHAT ARE MUTUAL AND JOINT WILLS?

Mutual wills are wills which dispose of the property of two testators, usually husband and wife, who have agreed to pool their assets and dispose of them according to an agreed plan. This would usually involve the conferring of reciprocal benefits, such as a life interest, and after death the property would go to the agreed upon beneficiaries. Sometimes persons who made mutual wills agree not to alter or revoke them without the consent of the other. This creates a "trust" situation, so the court will see to it that the property is disposed according to the agreement, even if one party should revoke or change his or her will after the other one dies. But it can be argued that an agreement not to revoke a will is not a good idea, because it ties the surviving spouse down.

A joint will is similar to a mutual will, except only one document is used.

Q. WHAT IS PROBATE AND ADMINISTRATION, AND HOW IS IT DONE?

Whether or not you leave a will your estate, that is, all of your property must be administered. Your property must be ascertained and creditors must be paid. Funeral expenses must be paid. Accounts have to be passed by the Surrogate Court or agreed to by the beneficiaries. Some or all assets have to be realized and the estate distributed. It is your "personal representative" who will have the task of administering your estate.

The personal representative named in a will is called an executor, if a man, and an executrix, if a woman. An administratrix (if female) or administrator, (if male) is a personal representative who the court appoints to administer an estate where the deceased dies intestate, or where a personal representative was not named in the will.

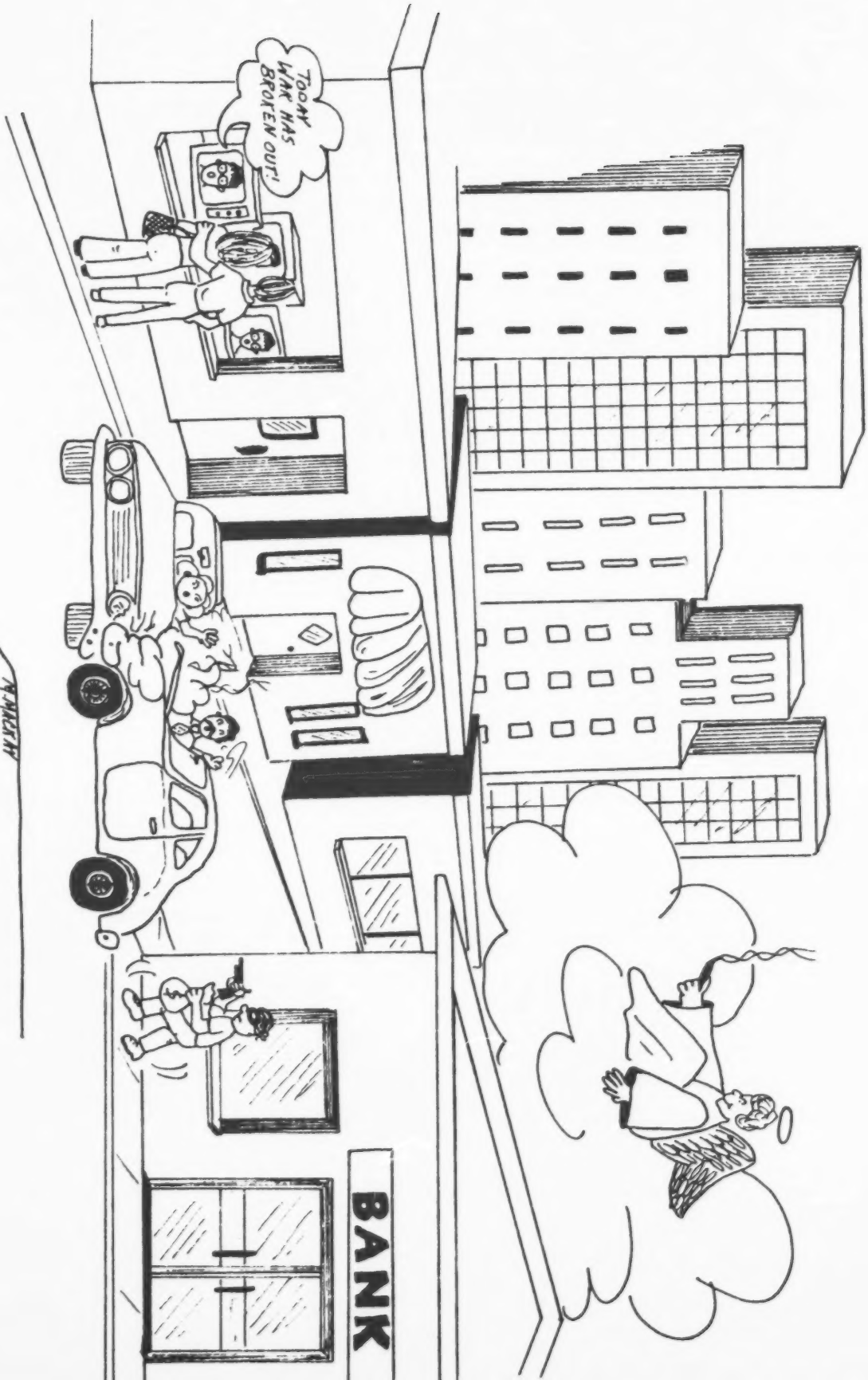
Probate is a legal term meaning proof. When a person dies leaving a will, the executor/trix named in the will must probate (prove) the will before he or she can safely proceed to administer the affairs of the deceased person.

It must be noted that whether you leave a will or die intestate, your property does not pass immediately to the designated beneficiaries. Your entire property first devolves upon your personal representatives. It is often advisable to name more than one executor/trix in your will, particularly if the estate is large and/or complicated. An executor/trix has the right to renounce if he or she is unwilling to serve in this capacity.

Therefore you should make sure that the person you intend to name as your executor/trix is willing to act as your personal representative. Even the settling of a simple estate can involve a fair amount of time and paperwork. In the case where there are no dependent children or long term assets to distribute, it will take about a year from the testator's death before the estate will have been administered. Your personal representative is also entitled to a fee for the work involved in the administration of the estate.

Your personal representatives must carry out the following duties, in administering your estate:

- 1) make funeral and burial arrangements if you have requested if you have requested such;
- 2) study your will and notify the beneficiaries of their inheritances;
- 3) arrange to have the will filed in the appropriate Surrogate Court and obtain the letters probate that gives him or her the official permission to act on your behalf;
- 4) provide for the immediate needs of dependents while the estate is being settled. Some portion of your bank account or insurance can be used for this purpose;
- 5) sue for the recovery of debt or any money that was owed to you. Your personal representative can also be sued by people to whom you were indebted;
- 6) assemble a list of the estate's assets. You can help in this regard by leaving such a list among your valuable documents;
- 7) distribute the surplus property according to the will or in accordance with The Devolution of Estates Act, once the debts are paid. Your personal representative is bound by the law to use to assets of your estate for the payment of your past debts; and
- 8) a mixed blessing - file your very last income tax return.



SITTING UP HERE, I CAN'T HELP BUT AGREE WITH THOSE WHO SAY, "DEATH IS A MIXED BLESSING." THERE ARE NO INCOME TAX RETURNS TO FILE, NO PROPERTY TAXES, NO DRIVER'S LICENSE RENEWALS, NO PENSION PLAN CONTRIBUTIONS, NO CAPITAL GAINS TAX, NO UNEMPLOYMENT INSURANCE CONTRIBUTIONS, NO MOTOR VEHICLE REGISTRATION RENEWALS, NO SALES TAX, NO AMUSEMENT TAX, NO...

If it is likely that you will leave assets in an estate that must be kept in trust for dependents until they come of age, it is essential that you word your will in a manner that will allow your executor to undertake any necessary financial business for the advantage of your estate. The trustee (or executor of an ongoing estate) should be empowered to invest the capital, as well as to keep it growing until such time as it is to be dispersed, and empowered to provide some income along the way for dependents.

Q. WHAT SHOULD I CONSIDER IN CHOOSING AN EXECUTOR?

In naming an executor/trix you should carefully consider your particular family. If you are leaving the bulk of your estate to your spouse or an adult family member, there is no reason why he or she cannot be the executor/trix. The naming of another adult, a trusted family friend, a lawyer, or an accountant should be considered if your beneficiary is likely to have difficulty with the financial aspects of the estate, or if the estate is complicated, a co-executor/trix gives the other someone to rely on.

As long as the person you name as executor/trix is of age, residency is of no concern. He or she can be from any country, but must come to Manitoba to probate the will.

Q. DOES ESTATE PLANNING HAVE A ROLE TO PLAY IN THIS AREA OF THE LAW?

Estate planning plays a major role in this area of the law. The advice of a lawyer who specializes in estate planning can do much to minimize taxes resulting from death, and can ensure that your desired wishes will be carried out, especially if you have a dependent with special needs.

Many of the matters to be considered have been outlined in the chapter on Business Organizations, Land Law, Taxation, and Estate Planning.

Q. WHAT CAN'T A WILL DO?

There are some things which a will cannot do. A will can only give away property that you own outright. Property owned as a joint tenant will be unaffected by a will, so that the property passes directly to the survivor.

A will can only give something away once. For example, the following clause would not be followed in its entirety, "I give all of my property to my wife, and after her death to our children". Once the estate passes to your wife it is hers to do with as she pleases. Since you have given your wife absolute ownership, the second part of the clause will be inoperative. The giving of a life estate to the wife would probably have accomplished the testator's desires in this situation.

Nor can a will impose conditions about inheritance which are against public policy. For example, the following conditional gift would be ineffective. "I leave my house to my daughter Mary, on the condition that she leaves her husband." Since this is a condition precedent to the inheritance of the house, and it is considered to be against public policy to encourage marriage breakup, the whole gift fails, and Mary gets nothing.

A will is a convenient place to suggest who should be the guardian of your children. You should include the administrative details of the guardianship. Or you could attach a memorandum concerning the guardianship of your children to your copy of the will. This latter method may be better, in that your idea of who would be the best guardian may change with the changing circumstances. It is simple enough to change the memorandum concerning guardianship without the expense of changing the will each time you change your mind. But, you must keep in mind the fact that the court has the final decision as to who will be the guardian(s) of your children. Although the court is bound to consider your opinion, it is not obligated to follow your wishes.

A will is generally all about disposing of property, and since a body is not "property", in the eyes of the law, a will probably is not the best place to state the funeral arrangements you want. Funeral arrangements are often included in a will however, even though a will is not usually looked at until after the funeral. Therefore, it is a good idea to inform your executor/trix of your preferences. Written instructions would be useful in case relatives try to insist on something else.

The Human Tissue Act governs if you wish to donate organs or any part of your body to science. It provides that if you are 18 years of age or over, you may direct in writing, or orally in the presence of at least two witnesses during your last illness, that your body or a specified part of your body be used after death for therapeutic purposes or for the purposes of medical education or research. It must be noted that instructions in a will in regard to the testator's body need not be followed by the personal representative. That is why we have The Human Tissue Act, so that you can direct the use of your body after you die.

WILLS - REFERENCES

Hreno, Carol, E., Wills and Succession, P.L.E.A., 1979.

Rosset, D. and Slough, D., Property and Succession Law,
P.L.E.A., 1979.

Glossary

A

Acceptance	the act of the offeree in agreeing to the (offeror's) offer.
Adjusted Cost Base	in regards to the <u>Income Tax Act</u> , capital gain is calculated by computing the difference between the proceeds of disposition and the adjusted cost base. The adjusted cost base is calculated by taking the actual cost of the property which includes the expenses of acquiring the property, and adjusting it so there won't be double taxation or missed taxation.
Affirm	to elect to abide by a voidable contract.
Agent	a person employed to act on behalf of another. An act of an agent, done within the scope of his authority, binds his principal.
Ante-nuptial agreement	an agreement made before marriage.
Applicant	the person that is making application for insurance, etc.
Appropriated	the setting apart of goods or money out of a large quantity as the property of a particular person.
Assignment	the transfer of legal rights by one party to another party.
Avoid	to make void.

B

Bailee	a person to whom the possession of goods is entrusted by the owner but not with the intention of transferring the ownership. For example, a person who borrows your tractor is a bailee.
Beneficiaries	one who is entitled to the benefit of property; one for whose benefit a trustee, or executor, etc., holds the property.
Breach of contract	a breaking of the obligation which a contract imposes.

C

Capital	the fund, the yield of which is profits or income. It bears the same relation to income as a tree does to its fruit.
Capital Cost	generally refers to the full cost to the taxpayer of acquiring depreciable property. This would include such costs as legal, accounting, and engineering fees.
Caveat	a warning. An entry made on the Certificate of Title of land, in the Land Titles Office is made to prevent a certain step being taken without previous notice to the person entering the caveat (who is called the caveator).
Consideration	is the price for which the promise or the act of the other is bought. It does not have to be money.

D

Damages	compensation or indemnity for loss suffered owing to a breach of contract or tort or due to the negligence of some other person. The principle is that the injured party should be put as nearly as possible in the same position, so far as money can do it, as if he had not been injured.
Depreciable Property	tangible property which depreciates over time. For example, a tractor. In contrast, land does not depreciate.
Devolve	to pass or be transferred from one person to another, particularly the passing of an estate from a deceased person.
Disposition	the act of disposing. The parting with, alienation of, or giving up property. Includes sale, and destruction if the property is injured.
Domocile	the country in which a person is, or is presumed to be, permanently resident. The place of a person's permanent home.
Duress	actual violence or threats of violence to the person.

E

Easements	the right of one land owner to utilize the land of another in a particular manner. This does not include the taking of any part of the natural produce of that land or of any part of its soil, e.g. rights of way, rights of light, rights of soil support, rights to a flow of air or water.
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Eligible capital property	intangible assets, the cost of which is called an eligible capital expenditure. For example, the "goodwill" built up in a business.
Encumbrances	a charge or liability against property, e.g., a mortgage.
Estate	the degree, quantity, nature and extent of interest which a person has in real property is usually referred to as an estate and it varies from absolute ownership down to naked possession. - the word "estate" has also come to signify not only the extent of interest in property, but also the property itself. Thus one speaks of "all my estate" or "his entire estate". In this context the term refers to every kind of property, real and personal.

F

Fair Market Value	the price at which property would change hands between a willing seller and a willing buyer, with neither being under any compulsion to buy or sell, and both having a reasonable knowledge of the relevant facts.
Fiscal Period	a period of time. Usually a twelve period, chosen by a business as the accounting period for its annual reports.
Fixtures	an object which is so attached to the land or to a building on the land as to be considered part of the land.

G

Garagekeeper's
Lien

a claim of lien against a motor vehicle made by a garagekeeper as provided in the Garagekeeper's Act.

Good Faith

an honest belief; the absence of malice; the absence of design to defraud or to seek as unconscionable advantage.

I

Income

the return in money from one's business, labour, or capital investment. Income is not a gain in capital or a growth in the value of the investment; this would be a capital gain.

Incriminate

to expose to an accusation or charge of crime; to involve one's self or another in a criminal prosecution or the danger of one.

Indemnify

to make good a loss which one person has suffered in consequence of the act or default of another.

Infant

anyone who is under the age of majority, 18 in Manitoba.

Insured

the person buying the insurance; ie. you.

Insurer

the company that provides the insurance coverage; ie. the insurance company.

Interpretation
Bulletin

a factual bulletin prepared by Revenue Canada outlining Revenue Canada's interpretation of a particular portion of the Income Tax Act.

Intestate

dying without a will.

Invitation to
Treat

the preliminary statements or negotiations that take place before an offer is made.

J

Jointly and
Severally

a liability is said to be joint and several when the wronged party may sue one or more of the parties to it separately, or all together.

L

Lessee

the one who rents the property from another; the tenant.

Lessor

the person who grants the lease; generally the landowner.

Lien

a lien in its widest sense is any charge for payment of a debt, or duty upon real or personal property. Liens may be either general or particular. A particular lien is the right to retain the thing for some charge or claim connected with the thing, such as a mechanic's right to retain a car s/he has repaired until the proper charges have been paid. A general lien is the right to retain the thing not only for such charges, but also for a general balance of accounts between the parties in respect to other dealings of like nature.

M

Misrepresentation

a statement or conduct which conveys a false or wrong impression.

Mortgagee	the lender of the mortgage debt.
Mortgagor	the one who borrows the money.

N

Negligence	the failure to do something which a reasonable person, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do. Doing something which a reasonable and prudent person would not do. The person suffering damage from someone's negligent act may sue.
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O

Offer	a definite statement that the person making it is willing to be bound on the terms stated.
Offeree	the person to whom an offer is made.
Offeror	the person who makes the offer, and looks for acceptance.

P

Part XI Assets	assets acquired on or after January 1, 1972, for which the taxpayer is allowed capital cost allowance.
Part XVII Assets	assets acquired before January 1, 1972, for which the taxpayer is allowed capital cost allowance.
Pecuniary	monetary; relating to money. Financial; consisting of money or that which can be valued in money.

Personal Property	any kind of property other than real property. It includes not only personal items such as furniture, private cars, etc., but can also refer to corporate assets, business equipment, inventory, etc.
Pledge	the transfer of the possession, but not ownership of a chattel as security for the payment of a debt or performance of an obligation. Upon default, the property may be sold.
Principal	one who authorizes another to act on his or her behalf. The party so authorized is called the <u>agent</u> .
Public Policy	certain classes of acts are said to be against public policy when the law refuses to enforce or recognize them on the grounds that they have a mischievous tendency. They would be injurious to the state or the community.

R

Realize	to obtain money in return for. To convert property into cash.
Real Property	any interest in lands, tenements or hereditaments; could include a right or easement in them as well. Includes all buildings or other things erected upon or affixed to the land.
Representation	a statement or assertion made by one party to a contract to another, before or at the time of the contract. It must be on some matter relating to the contract.
Revocation	cancelling, recalling or revoking.
Rollover	procedure where a taxpayer can transfer ownership of property to another without having to pay capital gains tax. The transfer is usually to a spouse or a child.

S

Secured Creditor	a creditor who holds as security for the debt a mortgage, charge or lien on or against the property of the debtor.
Security Interest	an interest in property which may allow the holder to repossess the property from whomever has it, or to stand as a secured creditor in cases of bankruptcy.
Severance	in relation to joint tenancies, it is the destruction of one of the essential requirements for the formation and continuance of a joint tenancy.
Specific Performance	where damages would be inadequate compensation for the breach of an agreement, the party that refuses to comply with the agreement may be ordered to perform what he or she has agreed to do by a decree of specific performance.
Subject Matter of the Insurance	the object insured.
Subrogation	the substitution of one person for another in the pursuit or enforcement of a lawful claim or right.

T

Tenant	one who occupies another's land or premises.
Third Party	a person who is a stranger to the transaction or proceeding; <u>stranger</u> meaning he or she is not one of the parties.
Tort	a private or civil wrong or injury other than a breach of contract, for which the court will provide a remedy. The remedy is usually in the form of an action for damages. A tort can also be considered to be the violation of a duty imposed by law, eg. the duty not to drive negligently.

Trust a relation or association between one person (or persons) on the one hand, and another person or persons on the other, based on confidence. Property is vested in one person on behalf of and for the benefit of another.

U

Undue Influence a situation where one is induced to do some act which he or she would not normally have done if he or she had been left to act freely.

V

Vendor a seller

Void of no legal effect; a nullity.

Voidable an agreement which one of the parties is entitled to get out of, and which has full legal effect until that happens. If the party entitled to get out does not, and affirms the agreement, he or she is bound.

W

Waive a person is said to waive a benefit when he or she renounces or disclaims it.

